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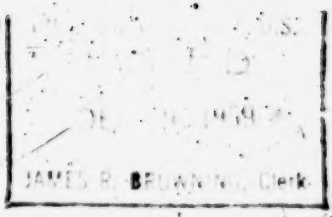

In the Supreme Court

OF THE

United States

October Term, 1939

No. 562

[illegible] Warden of the California State Prison at San Quentin,

Petitioner,

vs.

[illegible],

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

[illegible]

[illegible]

[illegible]

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement	4
Reasons for granting the writ	7
I.	
The opinion of the U. S. Court of Appeals, which adopts the opinion of the District Court, is in direct conflict with decisions of this court on the question of "waiver" and "failure to exhaust" state remedies; the opinion of the Court of Appeals completely disregards a reasonable state procedural rule	7
II.	
The importance of the question	11
III.	
The Court of Appeals has erroneously decided important questions of law concerning jurisdiction of federal courts over crimes committed by persons of Indian descent on Indian allotments from the public domain	12
A. Carmen and his victim were emancipated Indians. They are not Indians within the meaning of the statutes and decisions	14
B. The opinions below were in error in determining that an allotment from the public domain is Indian country	15
C. The Federal statutes do not warrant the interpretation that the federal government has exclusive jurisdiction in the Indian country	16
D. The federal government and the State of California have concurrent jurisdiction as to certain crimes committed in "Indian country"	17

Page

E. The present case will give this Court an opportunity to reexamine the doctrine of United States v. Kagama; the applicable statutes are unconstitutional as interpreted and applied by the District Court in the circumstances of the present case . . . 17

1. Congress does not possess constitutional power to pass a special penal law which applies to California Indians and which excludes application of state law . . . 17

2. Assuming that Congress possesses constitutional power to enact a penal law which is applicable to California Indians, but not other California citizens, nevertheless, this Court should consider whether or not the statute as here applied is unreasonable . . . 19

F. The importance of the "Indian" questions . . . 20

Conclusion . . . 21

Table of Authorities Cited

Cases — Pages

Bowen v. Johnston, 306 U.S. 19 . . . 11
Brown v. Allen, 344 U.S. 443 . . . 5, 6, 8, 11
Donnelly v. United States, 228 U.S. 243 . . . 16, 17
Draper v. United States, 164 U.S. 240 . . . 17
In re Carmen, 48 Cal. 2d 851, 313 P. 2d 817 (cert. den. without prejudice 355 U.S. 954) . . . 6
In re Wilson, 140 U.S. 575 . . . 16
Irvin v. Dowd, 359 U.S. 394 . . . 9
Lehman v. Sawyer, 106 Fla. 396, 143 So. 310 . . . 10
People v. Carmen, 36 Cal. 2d 768, 228 P. 2d 281 . . . 5
People v. Carmen, 43 Cal. 2d 342, 273 P. 2d 521 . . . 5
Perrin v. United States, 232 U.S. 478 . . . 19

Pages

State v. Utecht, 220 Minn. 431, 19 N.W. 2d 706 10
Sunal v. Large, 332 U.S. 174 (1947) 12
Tooisgah v. United States, 185 F. 2d 93 16
Toy Toy v. Hopkins, 212 U.S. 542 10
United States v. Kagama, 118 U.S. 375 ..... 17, 18, 19
United States v. McBratney, 104 U.S. 621 16
United States v. McGowan, 302 U.S. 535 17
United States v. Pelican, 32 U.S. 442 16
Williams v. Lee, 358 U.S. 213, 79 S.Ct. 296, 3 L.Ed. 2d 251 ..... 18, 19

Codes

18 U.S.C. 1151, 63 Stat. 94 ..... 3, 4, 15, 16, 17, 21
18 U.S.C. 1152, 62 Stat. 757 ..... 4, 16, 17
18 U.S.C. 1153, 63 Stat. 94 ..... 4, 16, 17
18 U.S.C. 3242, 63 Stat. 96 ..... 4, 16, 17
28 U.S.C., Section 1254(1) 2
28 U.S.C. 2241, 63 Stat. 105 4
28 U.S.C. 2254, 62 Stat. 967 ..... 3, 4, 8, 12

Constitutions

United States Constitution:
Article I, Section 8 18
Article II, Section 2 18
Article IV, Section 3 18

Texts

Henry M. Hart, Jr., 73 Harv. L.R. 84, pp. 101-121 12

Miscellaneous

House Report No. 308, 80th Congress, page 492 16
House Report 2503, 82nd Congress, Second Session, pages 67 and 72 20

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

FRED M. DICKSON, Warden of the California State Prison at San Quentin, California,

Petitioner,

vs.

RAYNA TOM CARMEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Fred M. Dickson, Warden of the California State Prison at San Quentin, California, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on September 29, 1959.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A, is reported at 270 F. 2d ____. The opinion of the United States District Court, which is included in the printed transcript of record, pages 54-76, is reported at 165 Fed. Supp. 942.

The opinion of the California Supreme Court which denied Carmen's petition for a writ of habeas corpus, printed as Appendix C, is reported at 48 Cal.2d 851.

JURISDICTION.

The order of the United States District Court, issuing the writ of habeas corpus and directing release of Carmen from custody, was entered September 12, 1958. This order is printed in the record at pages 76-77. The judgment of the Court of Appeals for the Ninth Circuit affirming the District Court was entered September 29, 1959, Appendix B.

A stay of mandate has been granted pending determination of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Did the District Court have jurisdiction to issue the writ of habeas corpus ordering Carmen's release?

a. Did Carmen's failure to raise the matter—that he was an Indian and the crime occurred in Indian

country—at the proper time under State procedure preclude him from raising the question on federal habeas corpus? Does this failure result in the waiver by Carmen of the federal question? Does this result in Carmen's having failed to exhaust his State remedies within the meaning of 28 U.S.C. §2254?

b. The California procedural rule does not permit a final judgment of conviction to be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction, or lack of jurisdiction because of the status of the parties, where there is no defect in jurisdiction appearing on the face of the record and where no exceptional circumstances exist. Is this California procedural rule a violation of due process?

2. Does the federal government have exclusive jurisdiction over a crime committed by a person of Indian descent where the crime occurred on an Indian allotment from the national forest lands?

a. Did Congress intend to create thousands of small islands of exclusive federal jurisdiction throughout the nation by including within the definition of Indian country "all allotments, the Indian title to which has never been extinguished?"

b. Was the locale of the crime, an allotment in trust from the public domain to a relative of the deceased, Indian country within the meaning of 18 U.S.C. 1151?

c. Were Carmen and his victim "Indians" within the meaning of the federal statutes?

d. Do the federal statutes grant the federal government exclusive jurisdiction over crimes in the Indian Country rather than concurrent jurisdiction with the State?

e. Does Congress possess the constitutional power to pass a special penal law which is applicable to the crime and the locale here involved and which excludes application of State laws?[1]

STATUTES INVOLVED.

18 U.S.C. 1151, 63 Stat. 94;
18 U.S.C. 1152, 62 Stat. 757;
18 U.S.C. 1153, 63 Stat. 94;
18 U.S.C. 3242, 63 Stat. 96;
28 U.S.C. 2254, 62 Stat. 967;
28 U.S.C. 2241, 63 Stat. 105.

These statutes are printed in Appendix D.

STATEMENT.

Respondent, Rayna Tom Carmen, is currently confined in the California State Prison at San Quentin on judgments of conviction of first degree murder and assault with intent to commit murder. He was first convicted in the Madera County Superior Court

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[1] The United States Attorney has previously been advised that California questions the constitutionality of the Federal statutes here involved. The United States Attorney has not appeared in the case.

in 1950 of murdering Wilbur Dan McSwain. At his first trial it was alleged and proved that the crimes had been committed in Madera County. On automatic appeal to the California Supreme Court the assault conviction was affirmed and the murder conviction reversed. See *People v. Carmen*, 36 Cal. 2d 768, 228 P. 2d 281.

Carmen was retried in the Superior Court of Madera County and again was convicted of first degree murder for the killing of Wilbur Dan McSwain. It was again alleged and proved that the murder had been committed in Madera County. At the time of the oral argument on the automatic appeal it was suggested for the first time that facts might be produced to show that the crime was committed on a small tract of land which constituted an Indian allotment and that exclusive jurisdiction might be vested in the federal courts. An application to produce additional evidence was denied by the Supreme Court on the ground that its jurisdiction extended only to the record before it. That court then affirmed the conviction of murder in the first degree. See *People v. Carmen*, 43 Cal. 2d 342, 273 P. 2d 521.

The transcript of the second trial in Madera County was filed with the District Court pursuant to *Brown v. Allen*, 344 U.S. 443, and forwarded as an exhibit to the U. S. Court of Appeals for the Ninth Circuit. The transcript has been forwarded to this Court.

Petitioner thereafter commenced habeas corpus proceedings in the California Supreme Court. He contended that he was an "Indian" and that the crime oc-

curred in "Indian country" and that as a result the Madera County Superior Court did not have jurisdiction.

The California Supreme Court appointed a referee. The referee held hearings in Sacramento, Madera, and San Quentin. The reporter's transcript of the oral testimony before the referee was filed in the District Court pursuant to *Brown v. Allen*, *supra*, and pursuant to stipulation. (R 91, R 99-100.) This transcript will hereinafter be referred to as California HCR. The transcript has been forwarded to this Court.

The California Supreme Court denied the writ of habeas corpus on the ground that the matter should have been raised at the time of the trial in the Superior Court of Madera County and that Carmen, having had the opportunity to raise the matter as a matter of defense in the trial court, was precluded from thereafter raising it. That decision is reported as *In re Carmen*, 48 Cal. 2d 851, 313 P. 2d 817 (cert. den. without prejudice 355 U.S. 954). This opinion is printed in Appendix C.

Carmen filed a petition for writ of habeas corpus in the United States District Court. The petition alleged that Carmen was an "Indian" and that the crime occurred within "Indian country," and that therefore exclusive jurisdiction existed in the federal courts. (R 14-15.) The crime was alleged to have occurred on an allotment to one Maggie Jim, the grandmother of the victim. The allotment was made from the public domain, the title being held in trust

by the Federal Government.[2] Carmen also contended that California's procedural rule which required him to raise the matter in the trial court was unconstitutional. (R. 15.)

The Warden filed a return setting up the commitments referred to herein. (R. 34-54.) After oral argument, and filing of written points and authorities, the court entered an opinion and order on September 11, 1958 finding for Carmen and issuing the writ of habeas corpus. (R 54-76.)

An appeal was taken to the United States Court of Appeals for the Ninth Circuit. That court rendered the opinion set out above and appearing in Appendix A.

REASONS FOR GRANTING THE WRIT.

I.

THE OPINION OF THE U. S. COURT OF APPEALS, WHICH ADOPTS THE OPINION OF THE DISTRICT COURT, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT ON THE QUESTION OF "WAIVER" AND "FAILURE TO EXHAUST" STATE REMEDIES; THE OPINION OF THE COURT OF APPEALS COMPLETELY DISREGARDS A REASONABLE STATE PROCEDURAL RULE.

The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the decisions of this Court. The opinion of the Court of Appeals adopts the opinion of the United States District Court.

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[2] This case presents two questions—the habeas corpus question and the "Indian" question—which turn on very different facts. For clarity, the facts concerning the locale of the crime and the "status" of Carmen as an Indian are stated more fully in the discussion of the Indian question.

That opinion states that the questions concerning federal versus state jurisdiction over the crime were not waived by Carmen's failure to raise them at the trial in the State court, in spite of the fact that the California Supreme Court placed its decision squarely on that ground. (See 48 Cal. 2d 851.) This failure to utilize the available state remedies has also been characterized as a failure to exhaust state remedies within the meaning of Title 28 U.S.C. § 2254.

The opinion of the Court of Appeals is thus in direct conflict with the opinion of this Court. (*Brown v. Allen*, 344 U.S. 443.) In the case of the petitioner *Daniels* this Court in the decision of *Brown v. Allen*, *supra*, stated as follows (pp. 486-487):

> "Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed."

Also see the similar language in the same case as follows (p. 503):

"Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343. When a State insists that a defendant be held to this choice of trial strategy and not be allowed to try a different tack on State habeas, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus."

The decision of the Court of Appeals is also in conflict with the decision of *Irvin v. Dowd*, 359 U. S. 394. This Court stated language as follows (p. 406):

"We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U.S.C. §2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the State, even though, as here, that court could have based its decision on another ground. *Wade v. Mayo*, 334 U.S. 672. In this view, we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground."

As indicated by the opinions below, the court ignored California's procedural rule and ignored the fact the California Supreme Court expressly and solely placed its decision in the habeas corpus case on the "procedural" ground. In so doing, the Court of Appeals and the United States District Court deci-

sions are in direct conflict with the decisions of this Court.

In discharging the writ of habeas corpus the California Supreme Court determined that a final judgment of conviction cannot be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction or lack of jurisdiction because of the status of the petitioner; where there is no defect in jurisdiction on the face of the record and where no exceptional circumstances exist.

This California procedural rule has been short circuited by the Court of Appeals and the District Court. A state prisoner need no longer comply with this State procedural rule. He may, instead, ignore it and proceed to have any federal question heard in the United States District Court.

In reaching this result the United States Court of Appeals and the United States District Court have impliedly held that the State procedural rule is unreasonable and thus a denial of due process.[3] Indeed, such rule is the long-established and widely followed rule in many jurisdictions.

Federal courts as well as state courts follow an identical rule (*e.g.*, see *Toy Toy v. Hopkins*, 212 U.S. 542. (Indian jurisdiction case.) Also see *State v. Utecht*, 220 Minn. 431; 19 N.W.2d 706 (Indian jurisdiction case); *Lehman v. Sawyer*, 106 Fla. 396; 143 So. 310 (territorial jurisdiction).

[3]Carmen so alleged. (R.T. 15.)

The California Supreme Court in the present case simply followed this long-established rule. California simply held that this matter which was in the knowledge of the defendant must be raised at the earliest moment or be deemed waived. This Court in *Brown v. Allen*, 344 U.S. 443, 503, made a similar statement.

Likewise, the opinions of the Court of Appeals and the District Court are in direct conflict with the decision of *Bowen v. Johnston*, 306 U.S. 19. The United States District Court finds exceptional circumstances in the present case. The California Supreme Court under California law determined that no exceptional circumstances existed. The United States District Court's interpretation of the exceptional circumstances doctrine of *Bowen v. Johnston, supra*—a case involving a federal prisoner—is erroneous. It is clear from a reading of the decision of *Bowen v. Johnston, supra*, that the absence of any dispute as to the facts was an important consideration in the case.

II.

THE IMPORTANCE OF THE QUESTION.

The scope of jurisdiction of the U. S. District Court to review state criminal convictions where the petitioner has failed to utilize an available state remedy is a matter which has not been clearly resolved. This question constantly arises in some 75 petitions filed every year in Federal District Courts by California prisoners. Based on the experience in California, this question must arise with great frequency in the 700-

800 petitions filed by the state prisoners in the 86 Federal District Courts. This case will enable this Court to clear up an "untidy" area of the law.[4]

Not only is this a matter of great practical importance for the guidance of United States District Courts in the exercise of their habeas corpus jurisdiction but also it is a problem which stands in the delicate area of federal-state relationships. This problem should be authoritatively determined, not left shrouded in conflict and confusion. We should not have one interpretation of 28 U.S.C. §2254 and the "waiver" doctrine in the Ninth Circuit and a different one in the other circuits.

III.

THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED IMPORTANT QUESTIONS OF LAW CONCERNING JURISDICTION OF FEDERAL COURTS OVER CRIMES COMMITTED BY PERSONS OF INDIAN DESCENT ON INDIAN ALLOTMENTS FROM THE PUBLIC DOMAIN.

Under this heading petitioner proposes to briefly point out important questions concerning federal jurisdiction over crimes committed by Indians on Indian allotments. The facts pertaining to these issues may be summarized as follows:

Carmen, an Indian by descent, shot and killed Wilbur Don McSwain and seriously wounded Alvin McSwain. This shooting occurred in the County of

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[4] See *Sunal v. Large*, 332 U.S. 174, 187 (1947) (Dissenting Opinion). See also Supreme Court 1958 Term—Foreword, Henry M. Hart, Jr., 73 Harv. L.R. 84, pp. 101-121.

Madera, State of California. The referee in the State proceeding determined that the locale of the crime, the McSwain residence, was "Indian country." This determination was based on the fact that McSwain's grandmother had received this land as an allotment from public domain and that the title to this allotment was held in trust by the Federal Government. (HCR 3-4.) This allotment was made out of the National Forest Lands. This land had never previously been set aside as an Indian reservation and there were no Indian reservations in Madera County. (HCR 6-7.) This allotment out of the public domain was surrounded by the National Forest Lands and private holdings. (HCR 133.).

Likewise, this allotment was part and parcel of the community of North Fork. The United States Marshal has never enforced the law in that area. (HCR 53:2, 65.) Carmen had never been advised or controlled by an Indian agent or commissioner. (HCR 65.) The local Justice of the Peace in North Fork has for many years exercised jurisdiction over disputes among the Indians and over misdemeanors. (HCR 57.) The Sheriff has constantly and continually exercised jurisdiction and kept the peace in the community of North Fork, including all Indian allotments. (HCR 73.) Carmen and the other Indians in this community have received all of the benefits of State and local government for many years, including the attendance at State public schools (HCR 129:9), benefits of county and State hospitalization, the benefit of programs of aid to the needy children, aid to the needy blind, and old age assistance (HCR 93, 65).

Carmen had voted in this area, had been in the United States Army, had held various jobs with lumber mills, the utility company and others in the area. (HCR 121-137.)

Carmen was a Mono Indian by descent; however, the descendants of the Mono group of Indians no longer have any tribal organization. They no longer have any chiefs. (HCR 135:21; 105:20.) They have no rules and regulations governing the conduct of any of their members. (HCR 101:12-17; 102-103.) Carmen was unable to state how one ceases to be a member of the tribe. Many of their customs are followed only by the older Indians and not by the younger Indians, including Carmen's generation. The only custom which survives is the burial ceremony. The attendance of this ceremony or participation in it is not compulsory. (HCR 131:16-21.) Carmen and his fellow Indians live in the same manner and mode as other persons in the community.

A. Carmen and his victim were emancipated Indians. They are not Indians within the meaning of the statutes and decisions.

Carmen and his victim were not Indians within the meaning of the federal statutes and decisions. The California habeas corpus proceeding, the transcript of which proceeding is an exhibit in this proceeding, establishes that the Mono Indians have no organization; they have no chiefs, they have no rules and regulations and they impose no sanctions. They are, in fact, less organized than many other racial groups.

There was evidence to substantiate the existence of some customs followed by the Mono Indians. The evi-

dence, however, establishes that these customs were followed primarily by the older Indians. Carmen's generation and the present generation of Mono Indians no longer follow these customs and the only custom of any significance brought out at the hearing before the Referee in the State habeas corpus proceedings was the burial custom. Attendance at this ceremony was not required.

Neither Carmen nor his victim were ever controlled or supervised by any Indian organization or by the Bureau of Indian Affairs. Carmen was partially educated in the State public schools.

The record establishes that Carmen was partially educated in the State public schools (HCR 129:18), was committed to a State hospital (HCR 121:7), served in the U. S. Army (HCR 123:3), draws disability pay from the Bureau of Veterans Affairs (HCR 137:20), voted (HCR 131-132), and was employed in various occupations in and around North Fork, Madera County (HCR 132:16). He was subject to no restrictions on account of his race, legal or otherwise. (HCR 106-107.) He was free to do as he pleased within the limits of the law without interference by the "tribe". (HCR 102.) He was thus emancipated within legal contemplation.

B. The opinions below were in error in determining that an allotment from the public domain is Indian country.

Section 1151 U.S.C., Title 18, defines Indian country to include "all Indian allotments, Indian titles to which have not been extinguished." In arriving at its conclusion that this includes all Indian allotments held

in trust by the Federal Government, the Court of Appeals and the District Court totally ignored 120 years of legislative and judicial use of the phrase "all Indian allotments, *Indian titles to which have not been extinguished*".

The phrase "Indian Title" originally referred to land over which the Indians had uninterrupted use and occupancy. However, *Donnelly v. United States*, 228 U.S. 243, held that statutorily recognized reservations constituted Indian country as well as did the lands to which the Indians retained their original right of use and occupancy. The decisions almost totally ignore these long-established meanings of the phrase "Indian Title".

The conclusion of the District Court is contrary to the language of *Tooisgah v. U. S.*, 185 F.2d 93 at 98. Likewise, the conclusion is contrary to the import of House Report No. 308, 80th Congress, page 492, which states that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*, 32 U.S. 442.

The subsection of 18 U.S.C. 1151 under discussion was intended to *codify* the Pelican rule, *not extend it*.

C. The Federal statutes do not warrant the interpretation that the federal government has exclusive jurisdiction in the Indian country.

The words "sole and exclusive" (18 U.S.C. 1152, 1153, 3242) do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. (*In re Wilson*, 140 U.S. 575; cf. *United States v. McBrat-*

ney, 104 U.S. 621; *Draper v. United States*, 164 U.S. 240.)

D. The federal government and the State of California have concurrent jurisdiction as to certain crimes committed in "Indian country".

There is nothing in the federal statutes which precludes a state from exercising criminal jurisdiction over the same criminal act. See *United States v. McGowan*, 302 U.S. 535, which disclaims exclusive jurisdiction. See, also, *Donnelly v. United States*, 228 U.S. 243, which upholds federal jurisdiction against an argument that the state had exclusive jurisdiction. That case, however, does not claim exclusive jurisdiction in the federal courts.

E. The present case will give this Court an opportunity to re-examine the doctrine of United States v. Kagama; the applicable statutes are unconstitutional as interpreted and applied by the District Court in the circumstances of the present case.

1. Congress does not possess constitutional power to pass a special penal law which applies to California Indians and which excludes application of state law.

The federal statutes, 18 U.S.C. 1151-1153, 3242, interpreted as granting exclusive jurisdiction over the crime in this case to federal courts, are unconstitutional.

Although the federal government may have *concurrent* power, it cannot assert exclusive power over a crime committed by a person of Indian descent, who is subject to no federal restrictions, who lives where he wishes, who is entitled to the full protection of California law, and where the crime is committed on

land allotted to an Indian out of the national forest, over which California has never ceded jurisdiction.

There are two possible grounds for ousting the State of California from jurisdiction over the crime of murder.

The first ground is that the federal government has exclusive territorial jurisdiction, e.g., a cession by the state or a military enclave. This is not such a case; California has never ceded jurisdiction over the land concerned in this case.

The only other ground for excluding California from jurisdiction is that California, by exercising criminal jurisdiction, is interfering with a federal function. Federal power over Indians rests on peculiar historical circumstances which no longer exist.

There are four possible sources of federal power over Indian affairs. These four are as follows: (1) the power to make treaties, Art. II, §2, United States Constitution, (2) the power to regulate commerce "with the Indian tribes," Art. I, §8, United States Constitution, (3) the power to regulate the use of federal property, Art. IV, §3, (4) the power to protect "wards" of the federal government. *United States v. Kagama*, 118 U.S. 375. Also see *Williams v. Lee*, 358 U.S. 213, 79 S.Ct. 296, 3 L.Ed. 2d 251.

The treaty power has been the basis for many decisions concerning Indian affairs. However, there has never been a treaty between the federal government and any California tribe of Indians.

The decisions of this Court reject the second and third possibilities as a source of power to punish

Indian crimes generally. See *United States v. Kagama*, 118 U.S. 375.

The *Kagama* case bases federal power over Indians upon a wardship theory, 118 U.S. at 383. The statements made to support the *Kagama* case are no longer true today. This doctrine is in need of reexamination. There have been no recent cases discussing this point. The opinion in *Williams v. Lee*, 358 U.S. 217 at 223 clearly indicates that the decision rests upon the existence of a treaty with the Navajo Indians (221-223). The present case involves no treaty.

2. **Assuming that Congress possesses constitutional power to enact a penal law which is applicable to California Indians, but not other California citizens, nevertheless, this Court should consider whether or not the statute as here applied is unreasonable.**

The opinion of *Perrin v. United States*, 232 U.S. 478 at 486, stated that the federal "power is incident only to the presence of the Indians and their *status* as wards of government, it must be conceded that it does not go beyond what is reasonably essential to their protection, . . . and must be founded upon some reasonable basis."

In the present case there are two factors which when combined make the statute as applied unreasonable. Here we have a person who may live where he pleases. He does not live on a reservation. He is subject to no control by an Indian commissioner (HCR 65); subject to no control by the tribe (HCR 101-103, 131). He is competent to contract. Defendant, in short, is subject to no restrictions on account of his race. He is an emancipated Indian. The relationship

between Carmen and the federal government is based upon his racial descent only.

Also, the locale of the crime was an allotment from the public domain. The allotment was never a part of a reservation or Indian community. It is in fact surrounded by residences of non-Indians, as well as Indians (11CR 133), the public domain, private holdings, and resorts.

This Court should determine whether or not the application of a federal penal statute, to the exclusion of a state statute, to an offense committed by this emancipated Indian in this locale is unreasonable and thus unconstitutional.

F. The importance of the "Indian" questions.

The proper definition of the phrase "the Indian titles to which have never been extinguished" is an important question in California as well as the rest of the states. There are two basic types of allotments, allotments from the public domain and allotments from Indian reservations. There are 905,037 acres of land allotted from public domain in the United States. There are 11,728,548 acres of land allotted from Indian reservations in the United States. There are 56,325 acres of land allotted from the public domain in California. There are 53,750 acres of land allotted from Indian reservations in California. *House Report 2503*, 82nd Congress, Second Session, pages 67 and 72.

Certainly Congress did not intend to scatter islands of exclusive federal jurisdiction throughout the national forests and throughout a community such as

North Fork, where the Indians live on their allotments in areas surrounded by non-Indians.

Since the 1953 legislation there is no question as to California's jurisdiction over crimes in the Indian country. However, "Indian country" as defined by 18 U.S.C. 1151 is used by Congress in other statutes concerning Indian affairs, for example, Indian liquor legislation.

This Court has not reexamined the wardship doctrine for many years. The court should take this opportunity to determine the power of Congress over Indian affairs in the absence of a treaty or any other power specifically granted Congress by the Constitution.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari be granted.

Dated, San Francisco, California,
December 2, 1959.

STANLEY MOSK,
Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Petitioner.

(Appendices "A", "B", "C" and "D" Follow.)

Appendix "A"

United States Court of Appeals for the Ninth Circuit

Fred M. Dickson, Warden of the California State Prison at San Quentin, California, Appellant, vs. Rayna Tom Carmen, Appellee.	No. 16,185 Sept. 29, 1959

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: Healy, Bazelon,* and Barnes, Circuit Judges

Per Curiam

This case is here on appeal from a decision of Chief Judge Goodman of the District Court on petition for the writ of habeas corpus, 165 F. Supp. 942.

Petitioner is an Indian. In 1950 he was convicted in the California Superior Court of the murder of one Dan A. [illegible]n, also an Indian. The crime was committed on land which was at the time allotted to Indians from the public domain and held in trust for the Indians by the federal government.

The exhaustive opinion of Judge Goodman leaves nothing to be added, and his judgment is affirmed.

(Endorsed:) Per Curiam Opinion. Filed Sept. 29, 1959.

Paul P. O'Brien, Clerk.

*District of Columbia Circuit, sitting by special designation.

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

Fred M. Dickson, Warden of the California State Prison at San Quentin, California, Appellant, vs. Rayna Tom Carmen, Appellee.	No. 16,185

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: September 29, 1959
Paul P. O'Brien, Clerk

Appendix "C"

In the Supreme Court of the State of California

In Bank

Criminal No. 5286

The People of the State of California,
Respondent,

vs.

Rayna Tom Carmen,
Appellant.

Opinion

A rehearing was granted to give further consideration to the question of receiving additional evidence on appeal in death penalty cases. For reasons hereinafter stated we have concluded that it may not be so received.

The defendant pleaded not guilty and not guilty by reason of insanity to a charge of the murder of Wilbur McSwain. One jury found him guilty of first degree murder, without recommendation, and another found him sane. The judgment sentenced him to death, and the case is here on automatic appeal. There was no motion for a new trial.

The defendant was previously tried on the same charge and found guilty of murder. At that trial he was also found guilty, under a second count, of assault with intent to murder Alvin McSwain, the brother of Wilbur. On appeal this court reversed the judgment of conviction of murder for refusal to give manslaughter instructions and because of the giving of erroneous instructions on first degree murder, but the judgment of conviction on the second count was affirmed. (People v. Carmen, 36 Cal. 2d 768.)

The evidence at the second trial was substantially the same as at the first. Briefly summarized it shows that on the evening of April 22, 1950, the defendant drove his car to a dance at Yosemite Forks in Madera County. Riding with him were Ella McSwain, Wilbur McSwain, Josephine Davis and Henry Chenot. Alvin McSwain was also at the dance. After the dance many of those attending, including the above mentioned persons, went to a place known as Kilroy's Last Stand, where soft drinks and sandwiches were sold. An altercation occurred in which Alvin McSwain, Henry Chenot and Ted Davis, Josephine's son, pushed the defendant to the ground. When he got up he threatened to kill the "whole family" and then left for his home 35 to 40 miles away. He obtained a rifle, loaded it, and drove to within ⅛ to ¼ of a mile from the McSwain home. He approached the house carrying the rifle, and, finding no one there, sat on the front porch. After 15 or 20 minutes he heard a car arrive and approached it. In the front seat of the car were Marion Donnell and Wilbur Mc-

Swain, and in the back seat were Ted Davis and Alvin McSwain. The defendant said he was going to kill all of them except Donnell, and he fired a shot across the front seat, striking Wilbur who was then standing on the other side of the car. He then walked toward the back of the car and fired three shots into the back seat, inflicting three wounds on Alvin. Immediately afterwards he was disarmed. Wilbur died from his wound several hours later.

The second trial was solely for the murder of Wilbur, and the defendant urges that it was error to admit evidence of the shooting of Alvin, because, he asserts, the assault was an independent offense other than that for which he was being tried. The shooting of Alvin occurred a few seconds after the defendant shot Wilbur. Alvin and Wilbur were both of the same family, and the defendant had threatened to kill the whole family. These and other circumstances of the case clearly show that the shooting of Alvin was a part of the same transaction in which Wilbur was killed, and evidence pertaining to it was therefore admissible. (Code Civ. Proc. §§ 1850, 1870; subd. 7; Pen. Code § 1102; People v. O'Bryan, 165 Cal. 55, 59; People v. Manasse, 153 Cal. 10, 12; People v. McClure, 148 Cal. 418, 421; People v. Teixeira, 123 Cal. 297, 298; People v. Crowley, 13 Cal. App. 322, 325-326.) Its relevancy on the issue of the defendant's intent in shooting Wilbur is obvious. (People v. Bermijo, 2 Cal. 2d 270, 277; People v. O'Bryan, supra, 165 Cal. 55; People v. Miller, 121 Cal. 343; People v. Craig, 111 Cal. 460; People v. Walters, 98 Cal. 138.) The case of People

v. Lane, 100 Cal. 379, relied upon by the defendant, did not involve factors here present such as the threat by the defendant that he was going to kill the "whole family" and the carrying out of his threat by killing Wilbur and by attempting to murder Alvin as part of the same affray. (See People v. Teixeira, supra, 123 Cal. 297, 298, pointing out that in the Lane case one of the two shootings was no part of the other shooting.)

In connection with the admission of the foregoing evidence, the defendant asserts that the court improperly instructed the jury. After pointing out to the jury that such evidence had been admitted the court went on to say that it was admitted for a limited purpose only, "not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action. You are not permitted to consider that evidence for any other purpose. . . . The value, if any, of such evidence depends on whether or not it tends to show: (1) the identity of the person who committed the alleged crime in question in this case, if it was committed; or (2) that the defendant had a motive for the commission of the offense charged against him in this action; or (3) that the defendant entertained the intent which is a necessary element of the alleged crime for which he now is on trial, as pointed out in other of my instructions; or (4) that the defendant was familiar with the means alleged to have been used in the commission of the crime of which he is accused in this

action; or (5) that the defendant possessed knowledge that might have been useful in the commission of the crime for which he is now on trial; or (6) that there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he is now on trial." Thereafter the court stated that the jury could consider the evidence for purposes (4) and (5), but could not consider it in connection with those purposes where the other offense involved was a "later offense". The defendant's point seems to be that the People knew that the Alvin shooting was a later offense than the killing of Wilbur and therefore should not have offered the instruction embracing (4) and (5). The instruction was somewhat inconsistent, for it said, in the listing of purposes, that the Alvin affair could be considered and, afterwards, that a later offense could not be considered. If there was error, however, we fail to see how it could have prejudiced the defendant. He admitted on the witness stand that he fired the shot which killed Wilbur and that he was thoroughly familiar with the manner of operating the gun, and, accordingly, there was no serious question at the trial with respect to the matters referred to in parts (4) and (5) of the instruction.

There is no merit in the defendant's claim that he was not permitted to explain his "physical condition." He testified that he had a pain in his head during and after the drive from Kilroy's Stand to his home and stated that it hurt particularly where there was a scar on his head. He was asked what caused the scar

and answered: "I was in an automobile accident, I had a fractured skull, unconscious seven days—MR. EYMAN [Special Deputy Attorney General]: I am going to object as incompetent, irrelevant and immaterial, if the Court please. THE COURT: Sustained, it calls for expert testimony." There was no attempt to strike the defendant's answer, and the sustaining of the objection did not eliminate the answer which had already been given. The defendant was then asked if "that particular part of your head hurt a little more than the rest of it?" and he replied, "Yes, it did." No further questions were asked on this subject, and the matter was dropped. It does not appear that there was any error in sustaining the objection. The materiality or relevancy of the question asked of the defendant was not apparent, and counsel for the defendant did not attempt to explain the purpose of the question or offer to show how an answer might be relevant. In the absence of such a showing no prejudice appears. (People v. Danielly, 33 Cal. 2d 362, 376; People v. Reyes, 194 Cal. 650, 652; People v. McGann, 194 Cal. 688, 692-694.)

On the trial of the plea of not guilty by reason of insanity, the court, over the defendant's objection, permitted the prosecuting attorney to open the case and to make the opening argument. Counsel for the defendant declined to argue the case on the insanity plea, and that issue was submitted to the jury after appropriate instructions. The defendant claims that, inasmuch as he had the burden of proof, such order of proof and argument constituted error. That ques-

tion appears to be settled. "No section of the Penal Code specifically directs the order of the trial upon a plea of not guilty by reason of insanity, and it has been repeatedly held that defendant has no right to open and close the argument to the jury (People v. Hickman (1928), 204 Cal. 470, 482 [268 P. 909, 270 P. 1117]; People v. Goold (1932), 215 Cal. 763, 766 [12 P. 2d 958]; People v. Kimball (1936), 5 Cal. 2d 608, 611 [55 P. 2d 483]; see, also, People v. Hardy (1948), 33 Cal. 2d 52, 65-66 [198 P. 2d 865]) although the trial court may permit him to do so (see People v. Lee (1930), 108 Cal. App. 609, 613 [291 P 887])." (People v. Letourneau, 34 Cal. 2d 478, 495.)

At the time set for oral argument of this appeal Mr. Robert Peckham, an assistant United States attorney, appeared before this court and stated that there was reason to believe that the crime was committed in "Indian country" as that term is defined by the federal statutes, that the defendant is an Indian and, therefore, that the United States may have exclusive jurisdiction over the matter. Subsequently defendant filed an application to produce additional evidence on appeal to show that he is an Indian and that the land on which the crime was committed was an Indian allotment. Thereafter the People filed a document, signed by the prosecution alone, which was entitled "Stipulation re Application to Produce Evidence." It stated, among other things, that defendant is an Indian but is a citizen of California who has never been subject to any restrictions on account of his race and has at all times enjoyed

all the rights and privileges of any other citizen, that decedent Wilbur McSwain was an Indian, that letters patent to the lots where the crime was committed were issued by the United States to Maggie Jim, an Indian, that the letters patent are still held in trust by the United States of America and that the lots have never been part of an Indian reservation. The defendant signed and filed a separate so-called "stipulation" in which he disagreed with some of the matters set forth in the document filed by the People but stated that defendant and Wilbur McSwain were Indians, that the alleged crime took place on lands allotted by the United States in trust for Maggie Jim, an Indian, and that the lands are still held in trust.

The briefs of the parties have presented numerous questions concerning the propriety of considering a stipulation of facts made on appeal, the meaning of the particular documents filed by the parties, the construction and effect of the pertinent federal statutes, and the constitutionality of such statutes if they are interpreted to vest exclusive jurisdiction over the crime in the federal government. We have concluded that the proposed offer to produce additional evidence on the appeal should be denied. Furthermore, even assuming that additional evidence could be received on appeal in this class of cases by stipulation or otherwise, the facts stated in the so-called "stipulation" as well as shown in the entire record are insufficient to show exclusive jurisdiction in the federal courts.

Since the defendant committed the crime in a county of this state, it may not be assumed that any special

circumstances existed which would deprive the state of jurisdiction. (People v. Collins, 105 Cal. 504, 509.) He cannot supplement the record by means of his application to produce additional evidence on appeal. Section 4 of article VI of the Constitution provides that the "Supreme Court shall have appellate jurisdiction on appeal from the superior courts . . ., *on questions of law alone*, in all criminal cases where judgment of death has been rendered. . . ." [Italics added.] Section 4¾ of article VI of the Constitution and section 956a of the Code of Civil Procedure permit receipt of additional evidence on appeal only where trial by jury is not a matter of right or has been waived, and it has been definitely held that an application such as that made by the defendant must be denied where, as here, a jury trial was not waived. (People v. Mendes, 35 Cal. 2d 537, 546; see also People v. Cowan, 38 Cal. App. 2d 144, 152-154.)

The evidence presented at the trial is not sufficient to permit a determination that there is exclusive federal jurisdiction in the present case, and we do not pass on the question of what remedies may be available to the defendant to show alleged lack of jurisdiction in the state court. Nothing in the record indicates that the location of the crime was "Indian country" within the meaning of any of the statutes which have been cited. (See, e.g., 18 U.S.C. §§ 1151, 1152, 1153 and 3242.) While there was evidence that defendant and the victim were "Indians," the use of this term, without more, shows only that the persons were Indian by race and blood. That fact is insufficient

to vest in the federal government exclusive jurisdiction over a crime committed in Indian country, because such jurisdiction does not exist when the crime involves Indians who have been emancipated in some manner, as, for example, by severing tribal relations and taking on civilized habits or by receiving a conveyance of allotted lands by patent in fee from the federal government. (25 U.S.C. § 349; Louie v. United States, 274 F. 47, 49 (murder); People v. Ketchum, 73 Cal. 635, 638-639 (recognizing the principle but not indicating whether the murder involved was committed in Indian country); State v. Bush (Minn.), 263 N.W. 300, 302-303; State v. Campbell (Minn.), 55 N.W. 553, 554; State v. Monroe (Mont.), 274 P. 840, 842-843 (manslaughter); People v. Livingstone (Sup.Ct., N.Y.), 205 N.Y.S. 888, 894-895; State v. Nimrod (S. Dak.), 138 N.W. 377, 378-379; State v. Howard (Wash.), 74 P. 382, 384-385 (murder); see also Irvine v. District Court (Mont.), 239 P. 2d 272, 275 (burglary); State v. Big Sheep (Mont.), 243 P. 1067, 1070, 1071.) These cases are to the effect that an Indian who has become emancipated is to be treated like any non-Indian for the purposes of jurisdiction in a case such as this, and it is settled that the state courts have jurisdiction, in the absence of an Indian treaty, where a non-Indian commits a crime against another non-Indian in Indian country. (New York v. Martin, 326 U.S. 496, 497 et seq.; Draper v. United States, 164 U.S. 240, 242 et seq.; United States v. McBratney, 104 U.S. 621, 624; see Williams v. United States, 327 U.S. 711, 714.)

In People v. Pratt, 26 Cal. App. 2d 618, 622-623, there is language, unnecessary to the decision, to the effect that the principles of the cases dealing with emancipated Indians do not apply where the defendant has committed murder or one of the other major crimes designated in what is now section 1153 of Title 18 of the United States Code. The Louie, Ketchum, Monroe, Howard and Irvine cases, cited in the preceding paragraph, involved those major crimes, and the only decision cited in the Pratt case does not support its statement. The language in the Pratt case must therefore be disapproved insofar as it is inconsistent with the views expressed herein.

The two documents entitled "stipulation," even if given the effect of a stipulation to the extent that they agree on some of the facts, are likewise insufficient to bring this case within the cited statutes pertaining to federal jurisdiction over offenses committed by or against Indians in Indian country. Insofar as the status of the defendant and Wilbur McSwain as Indians is concerned, the stipulation adds nothing to the evidence produced at trial because it, in effect, relates merely to the race and descent of these persons and does not disclose whether they were Indians of the type subject to federal jurisdiction or whether they were emancipated. Although the stipulation indicates that the crime was committed on allotment lands held in trust for an Indian and thus may have taken place in "Indian country" (18 U.S.C. § 1151), this alone, as we have seen, does not establish exclusive federal jurisdiction. Accordingly, since the stipu-

lated facts are insufficient to show that the courts of this state are without jurisdiction, we need not consider whether this court can properly determine a jurisdictional question upon the basis of facts contained in a stipulation made upon appeal.

Finally, the defendant asserts that the penalty imposed should be reduced. That cannot be done, however, in the absence of prejudicial error. (People v. Thomas, 37 Cal. 2d 74; People v. Odle, 37 Cal. 2d 52.) Here there is none.

The application to produce additional evidence is denied. The judgment is affirmed.

Shenk, J.

We Concur:

Edmonds, J.

Traynor, J.

Spence, J.

Peek, J. Pro Tem.

Concurring Opinion of Schauer, J.
To Opinion by Shenk, J.

I concur in the judgment.

I agree that the evidence in the record is prima facie sufficient to prove that the state courts of California possess and have exercised jurisdiction over both the defendant and the crime of which he has been convicted, and I further agree that there is no stipulation before the court establishing facts sufficient to show that the state courts of California lack juris-

diction either in respect to the defendant or the crime.

Schauer, J.

Dissenting Opinion

I dissent.

I agree with the majority that "where trial by jury is a matter of right", and a case has been tried by a jury, an appellate court cannot receive additional evidence on appeal. It does not necessarily follow, however, that an appellate court cannot consider stipulations and admissions of jurisdictional facts which are not part of the record. Where the parties join in a stipulation of facts on appeal the court is not thereby required to determine factual matters but remains strictly within its constitutional jurisdiction of deciding "questions of law alone." Although a number of cases, both in California and other jurisdictions, have considered the question of stipulations and admissions of fact on appeal, no case has been found that adequately discusses this problem.

The closest California case is People v. Mooney, 176 Cal. 105, 107, which involved an appeal from a conviction of murder where the death penalty was imposed. The court held that it could not consider a stipulation of the attorney general, in which defendant joined, that certain new evidence had been discovered after the denial of a motion for new trial and the taking of the appeal which led the attorney general to believe that, in the interests of justice, another

trial should be had. After quoting section 4 of article VI of the Constitution, the court stated (at p. 107 of 176 Cal.): "The provision means that an appeal in such cases is allowed solely for the purpose of obtaining the determination of this court as to whether there has been any error of law in the proceedings of the trial court. We have no other question to determine, and may lawfully determine no other question. If we find no substantial error of law, we must affirm the judgment of the lower court. It is clear, too, that in the consideration of such an appeal for this limited purpose, we are confined to the record sent to us from the court below." This language ignores the principle, noted above, that where the parties join in a stipulation of facts on appeal the court is not thereby required to determine factual matters but remains strictly within its constitutional jurisdiction of deciding "questions of law alone." Moreover, there is nothing in the wording of article VI, section 4, which specifically requires an appellate court to be "confined to the record" in the sense that it cannot look at stipulations and admissions of facts outside the record of the trial court.

The only other California case that appears to be in point is People v. Mesa, 121 Cal.App. 345, 347-348. There the court held that "the statements of counsel and the admission of the attorney-general in their briefs for the purpose of supplying the omissions in the record" could not be considered to establish who requested a particular instruction which defendant attacked on appeal. The appellate jurisdiction of Dis-

trict Courts of Appeal in criminal cases, like that of this court, is limited to determination of "questions of law alone" (Const., art. VI, § 4b), and the opinion, as in the Mooney case, does not discuss the possibility that the use of such statements and admissions is proper under the court's constitutional powers. Moreover, the authorities cited by the court in the Mesa case do not support its conclusion.

In other jurisdictions the cases are in conflict as to whether stipulations or admissions on appeal as to matters not in the record can be considered. Some cases hold that they will be considered. (State v. Goodager [Ore.], 108 P. 185 [admission on appeal concerning part of building where killing occurred]; Commonwealth v. Jester [Pa.], 100 A. 993, 994 [affidavits of defendant admitted by state to be substantially correct]; see State v. Bogen [N.J.], 98 A.2d 295, 298-299; State v. Miller [S.C.], 197 S.E. 310, 311.) Other cases hold that they will not be considered. (Hunter v. State [Ariz.], 30 P.2d 499, 501 [statement on appeal made by defendant conceded to be true by the attorney general]; Adams v. State [Ga.App.], 162 S.E. 164; People v. Loftus [Ill.], 81 N.E.2d 495, 498-499.) In none of the out-of-state cases, however, is there any discussion of the principles involved in determining whether or not a stipulation or admission on appeal will be considered, and none of them appears to involve jurisdictional facts.

While the majority refuses to decide the point, the attorney general argues that this court cannot consider stipulations on appeal as to jurisdictional facts

because, he asserts, jurisdiction is a question of fact for the jury and it would be a deprivation of the state's right of jury trial for the court to consider any evidence not presented to the jury. In this connection he argues that the state produced evidence to show that defendant committed a crime in California and asserts that all questions relating to federal jurisdiction are matters of defense. He relies on People v. Collins, 105 Cal. 504, 509, where it was held that federal jurisdiction over crimes committed on property owned by the United States is a question of fact and that, therefore, an information which merely alleged that a crime was committed within a certain county was sufficient although it failed to allege that the crime was not committed in those areas of the county subject to exclusive federal jurisdiction. (See also People v. Megladdery, 40 Cal.App.2d 748, 762-764.) Under the principles set forth above, however, it would seem that once the necessary facts are established by stipulation of the parties, the question of whether there is exclusive federal jurisdiction over the crime would be solely a matter of law. If the parties have established the jurisdictional facts by stipulation, they would not be deprived of their right to a jury determination because no question for the jury would remain, and they would have, in effect, waived any objection to lack of a jury trial on such facts.

As a practical matter, where the essential facts can be settled by stipulation of the parties, and where all questions of law can be determined on the appeal, it

would seem unnecessary to require the defendant to go through the motions of instituting an additional proceeding, such as habeas corpus. There is nothing in the California Constitution which prevents us from considering the stipulation of the parties, and in my opinion this court can and should do so in the present case.

As a preliminary matter, the attorney general now argues that "the parties have not entered into a stipulation of facts." Each party filed a separate "stipulation" herein, and the two documents are different in substance and language with respect to many items. Stipulations, of course, are contracts upon the terms of which the parties must come to an agreement. (See 23 Cal.Jur. 822.) Attached to the document offered by the People, however, is a copy of a letter to defendant's counsel stating that "this is as far as we can go in any stipulation of facts" and that if defendant had any objection to "any of the facts appearing in the stipulation or if you join in the stipulation we would appreciate it if you would advise the court in the premises." This letter seems to have left it open for defendant to accept or reject the People's stipulation in whole or in part. The defendant's stipulation was in response to that of the People and agreed with some items but expressly rejected others. Accordingly, I will proceed upon the theory that the parties have made a stipulation with respect to all matters as to which the two documents are substantially in accord.

It is stated in each document that defendant is an Indian, but this must be interpreted to refer only to

his race and blood because the People qualified their stipulation with the statement that defendant has never been subject to any restrictions on account of his race and has at all times enjoyed all rights and privileges of any other citizen of California. Both documents state that Wilbur Dan McSwain, the victim, "was an Indian," but, unlike the statement relating to defendant, no qualification is made by the People with respect to the status of McSwain. For this reason we should probably treat McSwain as an "Indian" not only as far as race and descent are concerned but also for purposes of the federal statutes which use the word "Indian." Some indication of the intent of the parties in using the word "Indian" may be derived from the fact that the documents submitted by both parties were entitled "stipulation [regarding] application to produce evidence," since the "application" which is thus referred to clearly indicates that the word "Indian" was there used for purposes of considering the federal statutes. It was also stipulated that the alleged crime took place on certain described lots in Madera County which are a part of the Sierra National Forest, that the United States, on November 26, 1920, issued an allotment* to the land to Maggie Jim, an Indian, and that the land is still held in trust by the United States of America. In summary, it appears that by stipulation it was shown that the de-

*The "stipulation" filed by the People refers to "letters patent" and does not contain the word "allotment," but the People's brief on jurisdiction (p. 6) and petition for rehearing (p. 19) state that the land was an "allotment in trust to the Indian Maggie Jim and heirs."

ceased, Wilbur Dan McSwain, was an Indian; that the defendant, Rayna Tom Carmen, is an Indian, and that the crime was committed on the Maggie Jim Allotment which was comprised of lands held in trust by the United States Government for a twenty-five year period (Federal Register, November 14, 1944; 9 F.R. 13699; Executive Order 9500).

The first question which we must consider is whether the federal government in 1950, the year of the alleged murder, had exclusive jurisdiction over crimes of this type in any case involving Indians and Indian country. The People contend that California then had at least concurrent jurisdiction in such situations, and they assert that the applicable federal statutes should not be interpreted to give the federal laws and courts exclusive control and that the wardship theory of federal power over Indians is outmoded. They also urge, in this connection, that exclusive federal jurisdiction is inconsistent with federal legislation, adopted in 1924, which provides that *all* Indians born in the United States are citizens.

On behalf of defendant, it is contended that the state court was without jurisdiction over him in that exclusive jurisdiction in such cases is vested in the United States and its courts by reason of sections 1151, 1152, 1153 and 3242 of the United States Code Annotated, as amended May 24, 1949. (U.S.C.A., Title 18.)

Section 1151 provides as follows: "Except as otherwise provided in sections 1154 and 1156 of this title

[those sections have reference to sales of liquor to Indians and the definition of the term 'Indian country,' as it relates to the liquor laws), the term 'Indian country,' as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished*, including rights-of-way running through the same." (Emphasis added; June 25, 1948, c. 645, 62 Stat. 757, amended May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Section 1152 provides: "Laws governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." (June 25, 1948, c. 645, 62 Stat. 757.)

Section 1153 provides in pertinent part: "Offenses committed within Indian country. Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." (The second paragraph of this section relates to rape; the third paragraph to burglary. Both provide that the crimes shall be defined as provided by the laws of the state in which they were committed. Burglary is to be punished in accordance with the laws of the state in which it is committed.) (June 25, 1948, c. 645, 62 Stat. 758, amended May 24, 1949, c. 139, § 26, 63 Stat. 94.)

Section 3242 provides that "All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." (June 25, 1948, c. 645, 62 Stat. 827, amended May 24, 1949, c. 139, § 51, 63 Stat. 96.)

I have concluded that defendant's position must be sustained. The sections define "Indian country" as including an Indian allotment, the Indian title to

which has not been extinguished and as being within the exclusive jurisdiction of the United States and that crimes committed by Indians against other Indians shall be punished under the general laws of the United States.

The People argue that defendant was a citizen of the United States and of this state and for that reason, our courts have jurisdiction. That contention was answered adversely to the People in United States v. Nice, 241 U.S. 591, wherein it was said (p. 598): "Citizenship is not incompatible with . . . continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."

The status of Indians as citizens seems immaterial in determining whether the federal government has exclusive jurisdiction over offenses in Indian country. In 1924 Congress provided that *all* Indians born in the United States are citizens of the United States. (8 U.S.C.A. § 1401, formerly 8 U.S.C.A. § 3.) Accordingly, all such Indians are citizens of the state in which they reside. (U.S. Const., Amdt. XIV.) It has been stated in analogous cases that the grant of citizenship to Indians does not mean that they are no longer wards of the federal government or subject to its guardianship and control. (See Board of Commissioners v. Seber, 318 U.S. 705, 715, 718 [Exemption of Indian's land from taxation]; United States v. Nice, 241 U.S. 591, 598 [sale of liquor to Indians]; Hallowell v. United States, 221 U.S. 317, 324; Cramer

v. United States, 261 U.S. 219, 232; Winton v. Amos, 255 U.S. 373, 391-392; United States v. Dewey County, 14 F.2d 784, 788.) Moreover, it seems obvious that the statutory granting of citizenship to all Indians born in this country was not intended to amount to an indirect wholesale abandonment of federal control, particularly in view of the many federal statutes upon Indians which were left unchanged, and it would be more reasonable to expect that, if such were intended, more specific language would have appeared in the statutes.

In Hallowell v. United States, 221 U.S. 317, 324, the defendant was an Omaha Indian residing in Nebraska. He was a citizen of the United States and of the state in which he resided. He contended at the trial that the state court had jurisdiction. The Supreme Court held that the federal courts had jurisdiction and said: ". . . [T]he United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample."

It is contended by the People that this state had jurisdiction in that it had never ceded jurisdiction over the land on which the crime occurred. In United States v. McGowan, 302 U.S. 535, it was held that the principle of exclusive federal jurisdiction over crimes involving Indians on Indian reservations is not based on a cession of such jurisdiction by the states to the federal government but is based on the constitutional authority of the United States to deal with the In-

dians. It is argued by the People that whether the defendant was a ward of the United States (as held in United States v. Kagama, 118 U.S. 375) was a question of fact which should have been raised at one of defendant's two trials, and that the burden was on defendant to prove such wardship, or jurisdiction, as a defense. In United States v. Rogers, 23 Fed. 658, it was held that the matter of jurisdiction in a criminal proceeding is never presumed; that it must always be proved and is never waived as a defense. It was further held there that the question of jurisdiction can be raised at any stage of the proceeding. (See, also, United States v. Anderson, 60 Fed.Supp. 649, 650, holding that if the court is without jurisdiction of the subject matter, its proceeding is a nullity.) "Even the consent of the accused cannot confer jurisdiction, and it is an issue that can be made at any stage of the proceedings, . . ." In Costa v. Banta (a civil case), 98 Cal.App.2d 181, 182, it was held that "Although the jurisdiction of that court was not questioned during the trial, it is well established that questions of jurisdiction are never waived and may be raised for the first time on appeal." In State v. Pepion (1951), 230 P.2d 961, the defendant, an Indian, committed larceny within the limits of an Indian reservation. The court held that he was subject to applicable federal laws and was under the exclusive jurisdiction of the United States courts. It was there held that the state district court was without jurisdiction and that its purported judgment was a nullity.

The People contend that section 1153 extended the definition of "Indian country" to cover Indian allot

ments for the first time in 1948 and that in order to vest exclusive jurisdiction in the United States (section 1151) such Indian allottees must have had an "unextinguished Indian title" to the land. By this, it is argued, is meant that the Indians holding under such an allotment must have had an "uninterrupted use and occupancy or to [sic] land which comprises a statutorily recognized Indian reservation." The crime occurred in 1950, and a complete answer to this argument is that the sections under consideration do not so provide. Nothing is to be found therein providing that Indian allotments must have once been part of an Indian reservation. The People contend that the sections were amended to cover Indian allotments after the decision in United States v. Pelican, 232 U.S. 442, 449, wherein it was held that land once part of an Indian reservation did not lose its character as Indian Country by reason of a subsequent allotment to Indians. It was there held: "But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they become other than Indian country through the distribution into separate holdings, the Government retaining control." It would appear that the Pelican decision adds nothing to the People's argument and serves merely to establish that the statute was amended so as to cover, specifically, Indian allotments. Tooisgah v. United States, 186 F.2d 93, relied upon by the People is not in point here. That case involved the murder of an Indian by an Indian in 1942. At that time section 1151 did not include Indian allotments within the definition

of Indian country. The court there said: "But, judging federal jurisdiction here under the words of the statute when the offense was committed, we are now constrained to hold that when the reservation was dissolved and tribal government broken up, the allotted lands lost their character as lands 'within any Indian reservation'." The court there noted that it was not alleged that either Indian involved occupied the status of an allottee of lands the title to which was held in trust by the United States and that federal jurisdiction was not invoked or sought to be sustained under the provisions of the General Allotment Act.

It is next contended that the United States cannot claim exclusive jurisdiction over crimes committed by Indians in Indian country and that the case of United States v. Kagama, *supra*, 118 U.S. 375, with its wardship theory, is obsolete. From this it is argued that because Indians are now citizens of the United States and of the state in which they reside (U.S.C.A., Tit. 8, § 1401 [formerly Tit. 8, §§ 601, 604]; Anderson v. Mathews, 174 Cal. 537; Piper v. Big Pine School Dist., 193 Cal. 664) they should be subject to the laws of the state in which they reside. It is said, with merit, that Congress itself has recognized the change in the condition of the California Indian in that it has expressly stated that California has jurisdiction over crimes by Indians in Indian country within the state. Public Law 280 was passed by the first session of the 83rd Congress, 1953, giving to California jurisdiction in such situations. The fact remains, however, that at the time the crime in question was committed Congress had not seen fit to so act.

The last contention made by the People is that this state has concurrent jurisdiction with the United States. Since the statutes in question provide that the United States has exclusive jurisdiction in such a situation, the contention is obviously without merit.

Inasmuch as the Superior Court was without jurisdiction to try defendant for the crime with which he was charged, the judgment of conviction is a nullity and should therefore be reversed with directions to the trial court to dismiss the information against the defendant.

Carter, J.

Filed August 17, 1954,
William I. Sullivan, Clerk.

Appendix "D"

18 USC 1151, 63 Stat. 94.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 USC 1152, 62 Stat. 757.

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

18 USC 1153, 63 Stat. 94.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the

same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 USC 3242, 63 Stat. 96.

All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

28 USC §2241, 63 Stat. 105.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 USC §2254, 62 Stat. 967.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1939.

No. 562

FRED M. DICKSON, Warden of the California State Prison at San Quentin, California,

Petitioner,

vs.

RAYNA TOM CARMEN,

Respondent.

REPLY BRIEF FOR RESPONDENT.

MASON A. BAILEY,

[redacted]

LEONARD J. BLOOM,

[redacted]

Attorneys for Respondent.

Subject Index

	Page
Opinions below	1
Statutes involved	2
Questions presented	2
Reasons for not granting the writ	3
Statement of the case	3
Argument	7
I.	
The opinion of the United States Court of Appeals is not in conflict with any decision of this court on the question of "waiver" or "failure to exhaust state remedies"	7
II.	
Remaining questions	17
Conclusion	18

Table of Authorities Cited

Cases	Pages
Bowen v. Johnston, 306 U.S. 19	10, 11, 12, 13, 16
Brown v. Allen, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397	8, 10, 12
Costa v. Banta, 98 C.A. 2d 181	14
Fred M. Dickson, Warden of the California State Prison, San Quentin, California v. Rayna Tom Carmen, 270 F. 2d	2

Pages

Ex parte Van Moore, 221 Fed. 954 16

Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 ..... 9, 12, 15

Gainesville v. Brown-Crummer Inv. Co., 277 U.S. 54, 48 S. Ct. 454, 72 L. Ed. 781 14

In re Bell, 19 Cal. 2d 488 16

In re Carmen, 48 Cal. 2d 851 ..... 13, 14

In re Connor, 16 Cal. 2d 701 17

In re Mooney, 10 Cal. 2d 1 17

In the Matter of the Application of Rayna Tom Carmen for a Writ of Habeas Corpus, 48 Cal. 2d 851 ..... 2, 6

Irvin v. Dowd, 359 U.S. 394, 3 L. Ed. 2d 900 ..... 8, 9, 12

Johnston v. Zerbst, 304 U.S. 458 ..... 13, 15

Matson Navigation Co. v. United States, 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336 14

Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L Ed. 791 15

Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543 15

People v. Carmen, 36 Cal. 2d 768, 228 Pac. 2d 281 ..... 1, 4

People v. Carmen, 42 A.C. 199 (Cal.), 265 Pac. 2d 900 ..... 1, 5

People v. Carmen, 43 Cal. 2d 342, 273 Pac. 2d 521 ..... 2, 5

People v. Oakland Waterfront Co., 118 Cal. 234 14

Petition of Rayna Tom Carmen for a Writ of Habeas Corpus, 165 Fed. Supp. 942 2

Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 16

State ex rel. Irvine v. District Court, 239 P. (Mont.) 272 16

Toolsgah v. United States, 186 F. 2d 93 16

Pages

Toy Toy v. Hopkins, 212 U.S. 542 10

United States v. Anderson, 60 F. Supp. 649 14

United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263 16

United States v. Rogers, 23 Fed. 658 14

United States ex rel. McCann v. Adams, 320 U.S. 220, 64 S. Ct. 14, 88 L. Ed. 4 16

Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 16

Constitutions

Constitution of the United States, Fourteenth Amendment .. 2

Statutes

California Penal Code, Section 777 2

Public Law 280, Chapter 505, 83rd Congress 3

28 United States Code:

Section 2241 13

Section 2254 ..... 7, 10

18 United States Code Annotated:

Chapter 53, Sections 1151, 1152 and 1153 2

Chapter 211, Section 3242 2

Texts

13 Cal. Jur. 2d 597 14

Federal Register, November 14, 1944; 9 F.R. 3699, Executive Order No. 9500 U.S. Cong. Service 1944, p. 1539 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 562

FRED M. DICKSON, Warden of the California State Prison at San Quentin, California,

Petitioner,

vs.

RAYNA TOM CARMEN,

Respondent.

REPLY BRIEF FOR RESPONDENT.

The respondent, Rayna Tom Carmen, presents the following in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed by petitioner:

OPINIONS BELOW.

People v. Carmen, 36 Cal. 2d 768, 228 Pac. 2d 281;

People v. Carmen, 42 A.C. 199 (Cal.), 265 Pac. 2d 900;

People v. Carmen, 43 Cal. 2d 342, 273 Pac. 2d 521;

In the Matter of the Application of Rayna Tom Carmen for a Writ of Habeas Corpus, 48 Cal. 2d 851;

The Petition of Rayna Tom Carmen for a Writ of Habeas Corpus, 165 Fed. Supp. 942;

Fred M. Dickson, Warden of the California State Prison, San Quentin, California v. Rayna Tom Carmen, 270 F. 2d ....;

STATUTES INVOLVED.

United States Code Annotated, Title 18, Chapter 53, Sections 1151, 1152 and 1153;

United States Code Annotated, Title 18, Chapter 211, Section 3242;

These sections are set forth in Appendix D of the petition filed by the Attorney General.

Fourteenth Amendment to the Constitution of the United States;

California Penal Code, Section 777 (Appendix A).

QUESTIONS PRESENTED.

(1) Does the Ten Major Crimes Act vest exclusive jurisdiction in the courts of the United States over a crime committed by an Indian against an Indian on an Indian allotment held in trust by the United States Government?

(2) Have the courts of the United States the power in habeas corpus to examine the facts outside the record for the purpose of determining jurisdiction of such a crime?

REASONS FOR NOT GRANTING THE WRIT.

Respondent contends that any further decision in this case would no longer be important so far as California Indians are concerned. In 1953, subsequent to the offense committed by Carmen, Congress granted to the State of California criminal and civil jurisdiction over all Indians within the Indian Country in the State. Should a similar situation arise, there would be no question regarding the jurisdiction of the California State Courts. The same law would also apply to Nebraska and most of Minnesota, Oregon and Wisconsin. 83rd Congress, Chapter 505, Public Law 280.

The decisions respecting Federal jurisdiction over crimes committed by Indians in Indian Country are not in conflict.

STATEMENT OF THE CASE.

On May 15, 1950, an Information was filed in the Superior Court of the State of California in and for the County of Madera charging the defendant, Rayna Tom Carmen in the First Count with the crime of murder of Wilbur Dan McSwain, and in the Second Count with assault with a deadly weapon to commit murder on the person of Alvin McSwain.

The defendant was thereafter found guilty on both counts and sentenced to death. On appeal to the Supreme Court of the State of California, the judgment was reversed as to count one (murder) and affirmed as to count two (assault). The ground for reversal was the refusal of the trial Court to give proper instructions. This case is reported in *People v. Carmen*, 36 Cal. 2d 768, 229 Pac. 2d 281.

In October of 1951, defendant was retried on the murder charge in the Superior Court of Madera County and found guilty of the alleged crime of murder in the first degree. During the progress of the two trials, it was in evidence that the defendant and both of the McSwains were Indians.

A second appeal was then taken to the Supreme Court of the State of California. At the time set for oral argument of the appeal, Robert Peckham, an assistant United States attorney, appeared before the Court and suggested that the case might present a question of Federal Jurisdiction in that the alleged crime was committed by an Indian against an Indian on United States Indian lands. The Court thereupon continued the hearing for the purpose of enabling respective counsel to enter into a stipulation of facts. Such stipulations were filed, and on February 1, 1954, the California Supreme Court, by unanimous decision, reversed the judgment with directions to the trial Court to dismiss the information against the defendant. The basis of the decision was the determination that the alleged crime was within the exclusive jurisdiction of the federal courts, and that the California

Courts had no jurisdiction. This case is reported in *People v. Carmen*, 42 A.C. 199 (Cal.); 265 Pac. 2d 900.

Thereafter the California Supreme Court granted a rehearing and a divided Court then reversed its prior ruling. The Court concluded that the offer to produce additional evidence on appeal should be denied. (*People v. Carmen*, 43 Cal. 2d 342.) The Court was careful however to say "we do not pass on the question of what remedies may be available to the defendant to show alleged lack of jurisdiction in the State Court". (p. 349.) In respect to the stipulation above referred to, the Court decided that they were insufficient to show lack of jurisdiction but expressly refrained from determining whether the jurisdictional question could be raised by stipulation on appeal. (pp. 350-351.)

There followed the habeas corpus proceedings in the State Court. On November 10, 1954, Carmen filed his petition for writ of habeas corpus before the Supreme Court of the State of California. On said date the writ was issued and the death penalty stayed pending final determination of the habeas corpus proceedings. On May 26, 1955, an order of reference was made and entered by the California Supreme Court whereby the Hon. John P. McMurray, judge of the Superior Court of the State of California in and for the County of Inyo, was appointed referee to take testimony upon certain interrogatories propounded by the Court and directed to the issue of federal jurisdiction. Thereafter, three hearings were held by said referee, and

the findings were, on May 17, 1955, filed with the California Supreme Court. On the basis of the evidence adduced, the referee found as follows:

(1) Wilbur Dan McSwain, the deceased, was an Indian;

(2) Rayna Tom Carmen is, and was, an unemancipated Indian;

(3) The alleged crime was committed on the Maggie Jim Allotment, which consists of land held in trust by United States Government for a twenty-five-year period. (Federal Register, November 14, 1944; 9 F.R. 3699, Executive Order No. 9500 U.S. Cong. Service 1944, p. 1539.)

On August 2, 1957, the California Supreme Court by four to three decision, decided to disregard the referee's findings and denied the writ. Dissenting opinions were filed by Justices Traynor, Carter and Schauer. This case was reported in *In Re Carmen*, 48 C. 2d p. 851.

On October 25, 1957, petitioner filed his petition for Writ of Certiorari before the Supreme Court of the United States, No. 577-Miscellaneous, October Term, 1957, and on January 13, 1958, the Supreme Court denied the petition "without prejudice to an application for a Writ of Habeas Corpus in an appropriate United States District Court". (355 U.S. 954.)

On April 2, 1958, the defendant filed an amended petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. On September 11, 1958, the Dis-

trict Court issued a writ of habeas corpus and directed that the petitioner, Rayna Tom Carmen, be released from custody. The opinion of the Court, 165 Fed. Supp. 942, is set forth in Appendix B hereof.

Thereafter, the appellant appealed this decision to the United States Court of Appeals, for the Ninth Circuit. On September 29, 1959, the Court of Appeals rendered a unanimous opinion upon the judgment of the District Court and stated therein:

> "The exhaustive opinion of Judge Goodman leaves nothing to be added and his judgment is affirmed." (See Appendix B. Petition for writ of certiorari.)

ARGUMENT.

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT ON THE QUESTION OF "WAIVER" OR "FAILURE TO EXHAUST STATE REMEDIES".

Petitioner seeks to prevent the courts of the United States from the examination of facts dehors the record in order to avoid federal statutes, which vest exclusive jurisdiction in the federal courts. Petitioner contends that such examination is contrary to some California procedural rules. (Petition, pp. 7-11.) It is argued that this constitutes a failure to exhaust state remedies within the meaning of 28 U.S.C. Sec. 2254, and is contrary to the decisions of this Court. The speciousness of this argument can be readily demonstrated.

Petitioner relies on *Brown v. Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397 and *Irvin v. Dowd*, 359 U.S. 394, 3 L. Ed. 2d 900. Neither of these cases is applicable here.

Brown v. Allen, supra, unlike the present case, did not involve a jurisdictional statute. The defendant there objected to discrimination in jury lists and alleged coercion of confessions. These matters were decided adversely to the defendants by both the North Carolina trial court, and the North Carolina Supreme Court. In addition, there was available in North Carolina the writ of error *coram nobis* to test constitutional rights by examination of facts outside the trial record.

In the allied case of *Daniels v. Allen* there was an additional feature: the failure of Daniels to perfect his appeal within the 60-day period permitted by North Carolina law. The opinion written by Mr. Justice Reed decided the *Daniels* case on this ground. This Court said:

> "As the failure to serve the statement of the case on appeal seems to us decisive, we do not discuss in detail the other constitutional issues tendered and only point out that they were resolved against petitioners by the sentencing state court and the Federal District Court." (344 U.S. 483, 73 S. Ct. 420.)

As a corollary to the foregoing, this Court held that petitioner was not entitled to a writ of habeas corpus because he had failed to exhaust state remedies by not complying with North Carolina's "adequate and

easily-complied-with method of appeal". (344 U.S. 485.)

The doctrine of waiver mentioned in the separate opinion of Mr. Justice Frankfurter (344 U.S. at page 503), referred to the general rule that constitutional rights such as the right to trial by jury (*Adams v. United States ex rel. McCann*) or the right of the accused to be present at all stages of a trial (*Frank v. Mangum*) may be knowingly waived at the trial or by failure to assert such errors on appeal. That the Court had no intention of overruling the well established Federal rule that facts outside the record may be examined in habeas corpus whenever exceptional circumstances warrant is clearly shown by the concluding sentence of the very paragraph quoted by petitioner:

> "However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543. Cf. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Royall, 117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868."

Irvin v. Dowd, supra, is clearly inapplicable here. This case likewise did not involve a matter of jurisdiction or a jurisdictional statute. The United States District Court and the Court of Appeals concluded that the Indiana Supreme Court decision rested on the fact that petitioner was an escapee when his motion for new trial was made, and thus barred under Indiana law. Since the appeal was from the denial of the motion for new trial, it was held that Indiana

appellate procedural rules had not been followed, and therefore, there was a failure to exhaust state remedies within the meaning of 28 U.S.C. Sec. 2254.

The majority opinion of this Court, delivered by Mr. Justice Brennan, determined that the appeal had been perfected in full compliance with Indiana procedural law. The Court therefore concluded that *Brown v. Allen*, supra, was inapplicable, saying:

> "This Court held that under the doctrine of exhaustion of State remedies, habeas corpus ought not to be granted, since petitioner has sought too late to invoke North Carolina's 'adequate and easily-complied-with method of appeal' (344 U.S. at 485). In contrast the petitioner's appeal from his judgment of conviction to the Indiana Supreme Court raising the constitutional claim was timely and was accepted by that Court as fully complying with all pertinent procedural requirements. Furthermore, the State Supreme Court did reach and decide petitioner's federal constitutional claim".

Two remaining decisions of this Court cited by petitioner, namely *Toy Toy v. Hopkins*, 212 U.S. 542, and *Bowen v. Johnston*, 306 U.S. 19 certainly do not aid petitioner. In *Toy Toy v. Hopkins* two Indians were indicted and convicted in the Oregon State Court and thereafter the Supreme Court of Oregon, on appeal, upheld their contention that the crime was exclusively within federal jurisdiction because committed on an Indian reservation. Thereafter, the defendants were tried and convicted in the federal Court under an indictment charging "Columbia George and

Toy Toy, Indians, with the murder of Annie Edna, an Indian woman, upon the Umatilla reservation". Five years after conviction, Toy Toy reversed his position and tried on habeas corpus to introduce evidence of facts showing lack of federal jurisdiction. These facts were in issue at the trial under the aforesaid indictment and were decided adversely to defendant. Therefore, defendant was properly foreclosed from raising the same facts, in habeas corpus, or otherwise.

The citation of *Bowen v. Johnston*, supra, is even more difficult to understand. In that case the sole question was whether the Court on habeas corpus could determine that a murder committed in Chattanooga National Park within the State of Georgia was within the exclusive jurisdiction of the United States, after failure to raise this question on appeal. The opinion of Mr. Chief Justice Hughes said:

> The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. . . . it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent. Among these exceptional circumstances are those indicating a conflict between State and Federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions. In re Lincoln, 202 U.S. 178, 182, 183, 26 S. Ct. 602, 603, 604, 50

L. Ed. 984; Henry v. Henkel, supra, pages 228, 229, 35 S. Ct. pages 56, 57.
(306 U.S. 27.)

The *Carmen* case falls squarely within the "exceptional circumstances" doctrine of *Bowen v. Johnston.* Moreover, we are not concerned with any state procedural rule or statute, as in *Brown v. Allen,* supra, and *Irvin v. Dowd,* supra. On the contrary, the majority opinion in the California Supreme Court is based solely on a misinterpretation of the decisions of this Court respecting the right to examine facts outside the trial court record on habeas corpus under exceptional circumstances. In the beginning, the California Court said:

> The people contend that the evidence is insufficient to sustain the referee's findings concerning the status of petitioner and Wilbur Dan McSwain. Upon further consideration, however, we have concluded that it is unnecessary to determine the sufficiency of the evidence to support the referee's findings or the adequacy of said findings. We have reached this conclusion because we are of the opinion that in the absence of exceptional circumstances, which are not present here, petitioner may not contest, in this collateral attack upon the final judgments of conviction, the trial court's determination and exercise of jurisdiction, upon the basis of new and additional facts which do not appear in the trial court record.
> (48 Cal. 2d 853.)

Then, the California Court, after reviewing the pertinent federal cases, from *Frank v. Mangum,* 237

U.S. 309 and *Bowen v. Johnston*, supra, to *Johnston v. Zerbst*, 304 U.S. 458, concluded that the "exceptional circumstances" rule applied only to a contest of jurisdiction based on a denial of constitutional due process of law as distinguished from jurisdiction based on federal statutes. (*In re Carmen*, 48 Cal. 2d 851, 856-859.)

The District Court opinion, adopted by the Court of Appeals in this case aptly pointed out that this is a distinction without a difference, inasmuch as the Federal habeas corpus statute, 28 U.S.C. Sec. 2241, extends the writ to all cases involving persons "in custody in violation of the Constitution *or laws* or treaties of the United States". (165 F. Supp. 942, 949.)

The District Court characterized the circumstances of this case as falling within the clear meaning of the "exceptional circumstances" doctrine. In this regard the Court said:

> "The testimony at petitioner's trial was that both he and his victim were Indians, and that the murder occurred at the victim's residence. Although these facts alone did not fully demonstrate the lack of jurisdiction in the trial court, they should have put the State Court on inquiry as to its own jurisdiction. *The right to be tried in a Federal court accorded petitioner by the Ten Major Crimes Act, was not a mere procedural right, waived unless asserted.** It could not have been waived even by express agreement. The Ten Major Crimes Act was enacted for the protection of the Indian wards of the United States. Both

*Emphasis is the writer's throughout, unless otherwise indicated.

the trial court and the state's attorneys had a duty to uphold this federal statute. They had a responsibility to see to it that the court did not improperly assume jurisdiction over an Indian ward of the Federal government".

(165 F. Supp. 942, 950.)

That the District Court and the Court of Appeals correctly interpreted the federal cases and applicable federal statutes is readily apparent. It is fundamental that where a court is without jurisdiction over the subject matter, its proceedings are absolutely void. Therefore, an objection to jurisdiction, historically and uniformly may be raised at any stage of the proceedings, and may be raised for the first time on appeal. Thus, the Court said in *United States v. Anderson*, 60 F. Supp. 649:

"Even the consent of the accused cannot confer jurisdiction, and it is an issue that can be made at any stage of the proceedings." (p. 650.)

See also:

United States v. Rogers, 23 Fed. 658;

Matson Navigation Co. v. United States, 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336;

Gainesville v. Brown-Crummer Inv. Co., 277 U.S. 54, 48 S. Ct. 454, 72 L. Ed. 781.

It had been presumed that this was likewise the law in California, until the *Carmen* case:

Costa v. Banta, 98 C.A. 2d 181;

People v. Oakland Waterfront Co., 118 Cal. 234, 239;

13 *Cal. Jur.* 2d 597.

Consequently, it has long been the federal rule that in matters involving such fundamental constitutional rights as the right to be tried by a court of competent jurisdiction, a court in habeas corpus may examine into facts outside the record of the trial court. The federal rule was clearly stated in *Johnston v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 as follows:

> "There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States *into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him*".
>
> (p. 1024.)

See also:

Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969;

Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543;

Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791;

Bowen v. Johnston, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 455;
Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;
United States ex rel. McCann v. Adams, 320 U.S. 220, 64 S. Ct. 14, 88 L. Ed. 4;
United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263.

In at least three federal cases involving jurisdiction over Indians, facts dehors the record were examined to determine jurisdiction:

Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367;
Ex parte Van Moore, 221 Fed. 954;
Tooisgah v. United States, 186 F. 2d 93.

The same rule has been followed in state Courts in Indian jurisdiction cases. The leading case is *State ex rel. Irvine v. District Court,* 239 P. (Mont.) 272.

Of particular interest is a recent state Court decision. In *Joseph Joe Wesley v. Merle E. Schneckloth,* proceeding No. 34127, decided by the Supreme Court of the State of Washington on November 19, 1959, ... P. 2d .....; the Court reviewed the *Carmen* litigation from its inception and based its decision on the Federal District Court opinion herein, as affirmed by the Court of Appeals.

As a matter of fact, until the *Carmen* case, the federal rule in respect to examination of facts outside the record in habeas corpus was likewise the rule in California. Thus, in *In re Bell,* 19 Cal. 2d 488, the Court said:

"A petitioner seeking habeas corpus, however, is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights (cited cases)". (p. 501.)

See also:

In re Connor, 16 Cal. 2d 701;
In re Mooney, 10 Cal. 2d 1.

The conclusion is inescapable that the United States District Court has the inherent power on habeas corpus to examine into jurisdictional facts outside the record in support of a federal statute vesting exclusive jurisdiction in the courts of the United States. This would appear to be particularly true where the applicant is a ward of the federal government, who made a prompt effort to present the jurisdictional facts on appeal as soon as they were suggested by the United States Attorney.

II.

REMAINING QUESTIONS.

The respondent believes that the decision of the United States District Court (Appendix B) is a full and complete answer to all remaining questions raised by the petition.

CONCLUSION.

Certiorari should be denied for two reasons: First, There is no conflict of decisions, Second: The question is not now important because of the 1953 Congressional legislation.

Dated, San Francisco, California,
December 24, 1959.

Respectfully submitted,

MASON A. BAILEY,

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Attorneys for Respondent.

(Appendices A and B Follow.)

Appendix A

Penal Code of California

Section 777 (Jurisdiction of offenses committed in state: Jurisdiction of county where committed: Non-support of minor ward of juvenile court.) Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States; and except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed; provided, that if a parent violates the provisions of section two hundred seventy of this code in respect to a minor child who has been declared a ward of the juvenile court of any county under the juvenile court law of this state, and by such juvenile court committed to the custody of a person, society or institution which places or keeps such child in another county, the jurisdiction is in either the county in which such commitment was made, or the county within which such minor child is placed or kept by authority of such commitment. (Enacted 1872; Am. Stats. 1901, p. 481 (unconstitutional); Stats. 1905, p. 692; Stats. 1919, p. 81.)

Appendix B

Petition of Reyna Tom Carmen
for a Writ of Habeas Corpus.
Civ. No. 37037.

United States District Court
N. D. California, S. D.
Sept. 12, 1958.

GOODMAN, Chief Judge.

Petitioner is confined at the California State Penitentiary at San Quentin pursuant to a judgment of conviction of murder and sentence of death imposed by the Superior Court of the State of California in and for the County of Madera, on October 30, 1951.[1] By an application for the writ of habeas corpus, he seeks his discharge on the ground that the California Superior Court lacked jurisdiction to try him for the murder of which he was convicted because exclusive jurisdiction to try him for such offense was vested by federal statute in the United States District Court.

The statute relied upon by petitioner is often referred to as the Ten Major Crimes Act[2] and is now incorporated in Sections 1151, 1153, and 3242 of Title 18 of the United States Code. It provides in substance that an Indian who commits any of the ten listed crimes, among which is murder, in Indian Country shall be subject to the same laws and penalties and tried in the same courts as persons committing such crime within the exclusive jurisdiction of the United States. During petitioner's trial in the Superior Court apparently he and his counsel, the prosecution, and the court were all unaware of this statute. There was testimony at the trial indicating that both petitioner and his victim were Indians, but this testimony was given as background information

[1] The offense was committed on April 23, 1950. A trial held in June 1950 resulted in a judgment of conviction which was reversed by the California Supreme Court for improper instructions. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281 (March 1, 1951). The judgment under which petitioner is now in custody was entered in a second trial held in October, 1951.

[2] As originally enacted in 1885, 23 Stat. 385, this Act dealt only with seven crimes and was then referred to as the Seven Major Crimes Act. In 1909, the crime of assault with a dangerous weapon was included. 35 Stat. 1151. And, in 1932, incest and robbery were added, 47 Stat. 337.

and not for the purpose of questioning the court's jurisdiction. There was evidence that the scene of the crime was the victim's residence, but this evidence did not establish that his residence was in Indian Country.

Upon the automatic appeal from the judgment of conviction and sentence of death, an Assistant United States Attorney appeared before the Supreme Court of California in behalf of the United States and advised the Court that since petitioner and his victim were Indians and there was reason to believe the locale of the crime was Indian Country, it appeared that the United States had exclusive jurisdiction to try petitioner. Thereafter the parties filed with the Supreme Court a stipulation that both petitioner and his victim were Indians by race and that the murder had been committed on an Indian allotment the title to which was held in trust by the United States. On the basis of this stipulation, the Supreme Court found that exclusive jurisdiction to try petitioner was vested by statute in the United States courts, and reversed the judgment of conviction. People v. Carmen, 265 P.2d 900 (Feb. 1, 1954). Upon application by the prosecution, a rehearing was granted.

On rehearing, the Supreme Court found the stipulation inadequate to establish that petitioner or his victim were Indians within the meaning of the Ten Major Crimes Act. It also found the evidence in the trial record inadequate to show that petitioner and his victim were Indians within the meaning of the Act or that the crime occurred in Indian Country. It therefore sustained the jurisdiction of the Superior Court upon the trial record and affirmed the judgment of conviction. People v. Carmen, 43 Cal.2d 342, 273 P.2d 521 (August 17, 1954).

Petitioner then sought to raise the jurisdictional issue by application to the California Supreme Court for a writ of habeas corpus. Upon the filing of this application on November 10, 1954, the Supreme Court issued the writ and appointed a Referee to take testimony and make findings regarding the Indian status of petitioner and his victim as well as the locus of the crime. At the hearings before the Referee it was again stipulated that the crime was committed on an Indian allotment title to which was held in trust by the United States and the petitioner and his victim were Indians by blood. In addition, on the basis of the testimony taken, the Referee found that petitioner and his victim belonged to the Mono tribe of Indians and were listed on the roll of

Indians maintained by the United States Department of Interior as members of such tribe. He further found that the tribe maintained a loose tribal organization and followed unique customs and that petitioner and his victim had never severed tribal relations.

After receiving the findings of the Referee, the Supreme Court of California nevertheless disregarded them, because in its opinion the trial court's exercise of jurisdiction could not be contested in a habeas corpus proceeding on the basis of new facts not appearing in the trial record. It therefore discharged the writ of habeas corpus. In re Carmen, 48 Cal.2d 854, 313 P.2d 817 (August 2, 1957).

During all of these years that the California Supreme Court wrestled with the jurisdictional question, petitioner remained in custody on death row in San Quentin. Upon the adverse ruling on his petition for habeas corpus, he applied to the United States Supreme Court for a writ of certiorari to review the judgment of the California Supreme Court. This application was denied on January 13, 1958 "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." Carmen v. Dickson, 355 U. S. 924, 78 S.Ct. 367, 2 L.Ed.2d 354. The application to this Court for the writ followed. An order to show cause was issued and a return was made by respondent. The cause has been argued and briefed by counsel for petitioner and respondent.

[1] Respondent initially questions the applicability of the Ten Major Crimes Act. The text of this act as it now appears in the United States Code is as follows:

18 U. S. C. §1153. *Offenses committed within Indian Country.*

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

18 U. S. C. §3242 *Indians committing certian offenses.*

"All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with in-

tent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

18 U. S. C. §1151. *Indian country defined.*

"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

The Indian allotment which was the site of the murder, for which petitioner was convicted, was made from lands in the public domain. Respondent urges that it consequently was not an allotment, the Indian title to which has not been extinguished and thus is not Indian country as defined in the Act. He contends that an allotment, the Indian title to which has not been extinguished, is an allotment from an Indian reservation or from land of which the Indians have had uninterrupted use and occupancy.

Respondent bases this interpretation of the statute primarily upon his view of its legislative history. The Ten Major Crimes Act as originally enacted on March 3, 1885, 23 Stat. 385, was not applicable to the Indian country generally but only to Indian reservations. But, when the Act was incorporated into the New Criminal Code in 1948, the reach of the Act was extended to all Indian country as defined in Section 1151 of the Code. Section 1151 represented the first attempt to statutorily define the term "Indian Country" since the Act of June 30, 1834, 4 Stat. 729, which had been repealed in 1874 (Revised Statutes §5596). Section 1151 resulted from the judicial definitions of the term in the intervening years. House Report No. 304, 80th Congress, page 492 states that Indian allotments were included in the definition of Indian Country on the authority of United States

v. Pelican, 1914, 232 U. S. 442, 34 S.Ct. 396, 399, 58 L.Ed. 676. In Pelican a murder had been committed on an Indian allotment which had been carved out of an Indian reservation and then excluded from the boundaries of the reservation. The Supreme Court held that so long as the United States held title to the allotment in trust for the Indian allottee it remained Indian country even though the allotment was no longer within the reservation. Respondent interprets the Pelican decision to mean that an allotment to be Indian Country must have been made from lands which were previously Indian Country. But this is an unduly restricted view of that decision. In Pelican the allotment in question had in fact been made from lands that were already Indian Country. But, that decision does not imply at all that this was a necessary prerequisite to the allotment being Indian Country. Indeed, quite the contrary is true. In Pelican, the reservation from which the allotment was made had itself been created out of the public domain rather than from land which had previously been in Indian possession. The Supreme Court noted that in an earlier decision, Donnelly v. United States, 1912, 228 U. S. 243, 33 S.Ct. 449, 57 L.Ed. 820, it had held that a reservation set apart out of the public domain was just as truly Indian Country as a reservation created from land which had always been occupied by Indians. The Court then went on to say that: "In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. * * * The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control."

Since all Indian allotments, regardless of their source, are maintained under the same type of Governmental supervision, either by holding title in trust for the allottee or by restricting alienation, there is no logical reason for making the application of protective criminal statutes dependent upon the source of the

allotment. But, if there were otherwise any doubt about the matter, there is an aspect of the legislative history of Section 1151, overlooked by respondent, which compels the conclusion that the Congress intended to include in this statutory definition of Indian Country all Indian allotments, *regardless of source*, while in trust or inalienable by the allottee. Prior to 1948 when Section 1151 was enacted, Section 241 of Title 25 of the United States Code made it a criminal offense to introduce intoxicating liquor into the Indian country and provided that such term should include "any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States." 52 Stat. 696. In 1948 Section 241 was repealed and the prohibition against introducing intoxicating liquor into the Indian country was incorporated in new Section 1154 of Title 18. But, the provision of the repealed Section 241 that Indian country should include "any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States," was omitted from the new Section 1154. The Reviser's Note specifically states this portion of repealed Section 241, "relating to the scope of the term 'Indian country' was omitted as unnecessary in view of the definitions of 'Indian country' in Section 1151" of Title 18. It is thus clear that when Congress provided in Section 1151 that Indian country should include "all Indian allotments, the Indian titles to which have not been extinguished," it considered this description broad enough to encompass all Indian allotments while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States. The allotment which was the situs of petitioner's offense is then Indian country within the meaning of the Ten Major Crimes Act.

[2] Respondent also questions the applicability of the Ten Major Crimes Act on the ground that petitioner, although an Indian by blood, is emancipated to such an extent that he is not an Indian within the meaning of the Act. None of the decisions relied upon by respondent support this contention. A proper understanding of these authorities requires a picture of the place of the Ten Major Crimes Act in the scheme of federal regulation of the American Indian.

Originally the federal government permitted the Indian tribes considerable governmental autonomy. The tribal autonomy was recognized in the Act of June 30, 1834, 4 Stat. 729, and 733, which extended the federal criminal laws to the Indian Country, but expressly made them inapplicable to crimes "committed by one Indian against the person or property of another Indian." In 1854, 10 Stat. 270, the federal criminal statutes as extended to the Indian Country were also made inapplicable to Indians committing *any* offense within the Indian Country if they were punished by the local law of the tribe.[3] But, as tribal authority diminished through the years and the Indians entered more and more into the life of the non-Indian communities, tribal autonomy in major criminal matters became undesirable. Thus in 1885, the Ten Major Crimes Act (23 Stat. 385) was passed to make the federal criminal statutes applicable to serious crimes committed by Indians on their reservations. The apparent effect of these federal statutes was to divide the jurisdiction over crimes committed by Indians in Indian Country between the federal government and the Indian tribes. However, some state courts recognized a small area of state jurisdiction by holding that an Indian who was not a member of any tribe was subject to state criminal jurisdiction even for offenses committed in the Indian country. Three of the decisions relied on by respondent so hold. Two of these decisions,[4] however, deal with offenses not enumerated in the Ten Major Crimes Act. Thus they are not direct authority for the proposition that non-tribal Indians are not Indians within the meaning of that Act. The third case, State v. Howard, 1903, 33 Wash. 250, 74 P. 382, does hold that an Indian who is not a member of any tribe is not an Indian subject to the Ten Major Crimes Act. But, in so holding it stands alone.[5] Its authority is weakened by the decision of the United States Court of Appeals for the Ninth Circuit in Davis v. United States, 1929, 32 F.2d 860, which appears to stand for the proposition that tribal rela-

[3]These statutory provisions are now incorporated in Section 1152 of Title 18 of the United States Code.

[4]People ex rel. Schuyler v. Livingstone, 1924, 123 Misc. 605, 205 N.Y.S. 888; State v. Campbell, 1893, 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169.

[5]Respondent also cites People v. Ketchum, 1887, 73 Cal. 635, 15 P. 353, which held a non-tribal Indian could be tried in the State courts for murder. But it does not appear in that case that the murder was committed on a reservation or elsewhere in Indian Country.

tions have no bearing on an Indian's status as an Indian within the meaning of the Ten Major Crimes Act. But whether or not Howard represents the correct interpretation of the term "Indian" as used in the Act, it is factually inapplicable to Petitioner, since Petitioner has been found to be a member of the Mono tribe.[6]

On February 8, 1887, two years after the passage of the Ten Major Crimes Act, the Congress enacted the Dawes General Allotment Act, 24 Stat. 388, 25 U. S. C. A. §348, which provided for the allotment of lands in severalty to Indians with the title held in trust for twenty five years. The Act specified that upon the completion of such allotment the allottee should "have the benefit of and be subject to the laws, both civil and criminal, of the State" where he resided. 25 U. S. C. A. §349. In 1906, the Dawes Act was amended to make it clear that the allottee should not be subject to state law until the trust period expired and he received a fee patent. 34 Stat. 182.

As additional authority in support of the argument that petitioner is an emancipated Indian not subject to the Ten Major Crimes Act, respondent cites a decision by the Court of Appeals for this circuit[7] and a decision by the Supreme Court of Montana[8] holding that an Indian who has received a fee patent to land allotted under the Dawes Act is no longer subject to the Ten Major Crimes Act. There are decisions of the United States Supreme Court which, while not directly contrary, make these decisions questionable.[9] But, right or wrong, they are factually irrelevant inasmuch as petitioner has never received an allotment under the Dawes Act.

[3] Respondent has cited no cases, and there appear to be none, which suggest any method of emancipation which might except an Indian from the provisions of the Ten Major Crimes Act, other than the severing of all tribal relations or the obtaining of a fee patent to land allotted under the Dawes Act.

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[6]It was agreed that the evidence adduced at the hearing before the Referee appointed by the Supreme Court of California might be considered as though received in this proceeding.

[7]Eugene Sol Lomo v. United States, 9 Cir., 1921, 274 F. 47.

[8]State v. Monroe, 1929, 83 Mont. 556, 274 P. 840.

[9]See Reece v. Olson, 1945, 324 U.S. 786, 790-791, 65 S.Ct. 989, 89 L.Ed. 1367, and the cases there cited.

Whether or not non-tribal Indians or Indians holding a fee patent to land allotted under the Dawes Act are subject to the Ten Major Crimes Act is unnecessary to decide. For there is no doubt that petitioner, who has received no allotment and is an Indian by blood, enrolled as a member of the Mono tribe by the Bureau of Indian Affairs, is an Indian subject to that Act.

[4] Respondent next contends that the Ten Major Crimes Act does not vest the federal courts with exclusive jurisdiction over the offenses enumerated in the Act, but only grants jurisdiction to be exercised concurrently with the State courts. This contention is wholly untenable. The language of the Act which specifies that Indian offenders subject to the Act "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States" clearly contemplates that Indian offenders shall be tried exclusively in the federal courts. There are many cases that so hold,[10] and none which hold to the contrary.

[5] Respondent's final contention in respect to the Ten Major Crimes Act is that the Act is unconstitutional if interpreted to vest the federal courts with exclusive jurisdiction over the murder committed by petitioner. In United States v. Kagama, 1886, 118 U. S. 375, 6 S.Ct. 1109, 30 L.Ed. 228, the constitutionality of the Ten Major Crimes Act was upheld on the theory that the Indians are a dependent people within the limits of the United States who must of necessity be the wards of the national government. Respondent suggests that United States v. Kagama is obsolete. He urges that the wardship theory can not sustain the constitutionality of the Ten Major Crimes Act as applied to a crime on an allotment from the public domain and to an Indian offender, who is a citizen of the United States and the State of California, who lives where he pleases unsupervised by any federal agency and who is entitled to educational facilities, welfare services, and other benefits supplied by the State of California.

But, the Supreme Court of the United States has consistently rejected all arguments that Federal power to regulate the Indians

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[10] See e. g. Ex parte Pero, 7 Cir., 1938, 99 F.2d 28; Yohyowan v. Luce, D.C. 1923, 291 F. 425; State v. Pepion, 1951, 125 Mont. 13, 230 P.2d 961; State v. Columbia George, 1901, 39 Or. 127, 65 P. 604; People ex rel. Cusick v. Daly, 1914, 212 N.Y. 183, 105 N.E. 1048; State v. Condon, 1914, 99 Wash. 97, 139 P. 871; Ex parte Cross, 1886, 20 Neb. 417, 30 N.W. 428; State v. Campbell, 1893, 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169.

has diminished as federal control has been relaxed. Thus the Court has held that the grant of national and state citizenship to the Indians in no way altered their status as wards of the Federal government.[11] The Court has repeatedly stated that it rests with the Congress to determine when and how the national guardianship shall be brought to an end, and whether the emancipation shall at first be complete or only partial.[12]

In 1953, subsequent to the offense committed by Carmen, the Congress did substantially curtail the Federal guardianship over the California Indians by granting the State of California criminal and civil jurisdiction over Indians within all of the Indian Country in the State, subject to limited exceptions. 67 Stat. 588. This action was taken by the Congress only after careful study.[13] It would certainly be presumptuous of this Court to substitute its judgment for that of the Congress and hold that this action should have been taken sooner, and that Congressional power to assert criminal jurisdiction over the California Indians had previously expired. Respondent's contention that the Ten Major Crimes Act is unconstitutional as applied to petitioner cannot be sustained.

[6] There remains the question whether the lack of jurisdiction in the State court can be entertained in this habeas corpus proceeding inasmuch as the test of the state court's jurisdiction requires consideration of some facts dehors the trial record. The decisions of the United States Supreme Court, defining the scope of the inquiry that may be made in a habeas corpus proceeding, leave no doubt that this Court has the power to consider the jurisdictional issue. In Frank v. Mangum, 1914, 237 U. S. 309, at page 331, 35 S.Ct. 582, at page 588, 59 L.Ed. 969, the Court said,

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[11]Board of Commissioners of Creek County v. Seber, 1943, 318 U.S. 705, 718, 63 S.Ct. 920, 87 L.Ed. 1094; Tiger v. Western Investment Co., 1911, 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738; United States v. Celestine, 1909, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195.

[12]Board of Commissioners of Creek County v. Seber, 1943, 318 U.S. 705, 718, 63 S.Ct. 920, 87 L.Ed. 1094; United States v. Nice, 1915, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192; Tiger v. Western Investment Co., 1910, 221 U.S. 286, 310 et seq., 31 S.Ct. 578, 55 L.Ed. 738; Perrin v. United States, 1913, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691; United States v. Sandoval, 1913, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107; United States v. Rickert, 1903, 188 U.S. 432, 445, 23 S.Ct. 478, 47 L.Ed. 532.

[13]See House Report 848, 83rd Congress, 1st Session, 1953 U.S.Code Congressional and Administrative News, p. 2409.

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him." See also, Mooney v. Holohan, 1935, 294 U. S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Moore v. Dempsey, 1923, 261 U. S. 86, 43 S.Ct. 265, 67 L.Ed. 543.

The Supreme Court of California, in refusing to consider the jurisdictional issue here tendered upon petitioner's application for the writ of habeas corpus, noted that these decisions of the United States Supreme Court considering facts dehors the trial record involved claimed denials of fundamental constitutional rights. This, said the California Supreme Court, distinguishes those cases from the present case where the claim of want of jurisdiction is based on petitioner's status and the locus of the crime. In re Carmen, 48 Cal.2d 851, 859, 313 P.2d 817. Implicit in this attempted distinction is the suggestion that a claim of lack of jurisdiction because of a violation of a constitutional right is of greater consequence than a claim of the wrongful assumption of jurisdiction in violation of a federal statute. But, the federal habeas corpus statute, which was interpreted by the United States Supreme Court, makes no distinction between violations of constitutional rights and violations of rights accorded by statute. It extends the writ of habeas corpus to all cases of persons "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241.

Respondent cites a number of federal cases in which the Court in a habeas corpus proceeding declined to consider a jurisdictional question dependent upon facts dehors the record. One of these cases, Rodman v. Pothier, 1924, 264 U. S. 399, 44 S.Ct. 360, 68 L.Ed. 759, is irrelevant because there the jurisdictional issue was raised by petition for habeas corpus before trial. Another, In re Lincoln, 1906, 202 U. S. 178, 26 S.Ct. 602, 50 L.Ed. 984, is of

no value because it dealt with an attempt to secure direct review of a judgment of conviction by the United States Supreme Court by petition for the writ of habeas corpus, in avoidance of the normal appellate process. In the remainder of the cases cited by respondent,[14] the facts dehors the record alleged in support of the claim of want of jurisdiction were inconsistent with jurisdictional facts alleged in the indictment. In the present case, the absence of jurisdiction in the State court is evidenced partially by the trial record and partially by new facts in no way inconsistent with any facts alleged in the information or found by the court.

In Ex parte Van Moore, D.C. 1915, 221 F. 954, a case strikingly similar to this one, the United States District Court for South Dakota, upon a petition for habeas corpus, considered facts outside the trial record in holding the Circuit Court of the State of South Dakota lacked jurisdiction to try an Indian for a murder committed upon an Indian allotment. In Ex parte Pero, 1938, 99 F.2d 28, another similar habeas corpus proceeding, the Court of Appeals for the Seventh Circuit also appears to have looked to facts dehors the record in holding that the State of Wisconsin was without jurisdiction to try an Indian for a murder committed on a reservation within the State.

But, respondent urges that even if it be conceded that this Court has the power in this proceeding to look to facts outside the trial record to test the jurisdiction of the State court, the exercise of this power is proper only upon a showing of exceptional circumstances. However one might characterize the circumstances in this case, they clearly warrant the exercise of this Court's power to inquire into the jurisdiction of the State court.

[7] The testimony at petitioner's trial was that both he and his victim were Indians, and that the murder occurred at the victim's residence. Although these facts alone did not fully demonstrate the lack of jurisdiction in the trial court, they should have put the State Court on inquiry as to its own jurisdiction. The right to be tried in a Federal Court accorded petitioner by the Ten Major Crimes Act, was not a mere procedural right, waived unless asserted. It could not have been waived even by

[14] Toy Toy v. Hopkins, 1909, 212 U.S. 542, 29 S.Ct. 416, 53 L.Ed. 644; Davis v. Johnston, 9 Cir., 1944, 144 F.2d 862; Hatten v. Hudspeth, 10 Cir., 1938, 99 F.2d 501; Walsh v. Johnston, 9 Cir., 1940, 115 F.2d 806; Walsh v. Archer, 9 Cir., 1934, 73 F.2d 197; Ex parte Savage, C.C.Kan., 1908, 158 F. 205.

express agreement. The Ten Major Crimes Act was enacted for the protection of the Indian wards of the United States. Both the trial court and the state's attorneys had a duty to uphold this federal statute. They had a responsibility to see to it that the court did not improperly assume jurisdiction over an Indian ward of the Federal government.

When the matter came to the attention of the United States, its representative promptly advised the California Supreme Court of the jurisdictional question while the appeal was pending. The stipulation of the parties that petitioner was an Indian by blood, and that the locus of the crime was an Indian allotment, the title to which was held in trust, constituted at the least a prima facie showing of the lack of jurisdiction in the State court. If, in the opinion of the California Supreme Court, the exclusive federal jurisdiction also depended upon the fact that petitioner was a tribal Indian and had not [illegible]ved a fee patent to an allotment under the Dawes Act, these w[illegible]e facts which were a matter of public record and easily ascertainable. They were in fact ascertained by the Referee appointed by the California Supreme Court upon petitioner's application for the writ of habeas corpus, which was promptly presented to that court after his unsuccessful appeal. Yet the California Supreme Court deemed itself powerless to remedy an assumption of jurisdiction clearly in violation of a federal statute.

Under these circumstances, it becomes the plain duty of this Court to protect the jurisdiction vested in the Federal Courts by the Ten Major Crimes Act.

It appears from respondent's return to the order to show cause, that in the trial in June 1950 in which petitioner was originally convicted of murder, he was also tried and convicted for assault with intent to murder. Although the judgment of conviction of murder entered in that trial was reversed for improper instructions, the judgment of conviction of assault with intent to murder was affirmed on appeal, People v. Carmen, 36 Cal.2d 768, 228 P.2d 281 (March 1, 1951) and is still outstanding.

Petitioner's application for the writ of habeas corpus directly challenges only the judgment of conviction for murder in his second trial for that offense. And, in their argument and briefs the parties concerned themselves solely with that judgment. But, inasmuch as petitioner's application seeks his discharge from cus-

tody and respondent has asserted in his return to the order to show cause the judgment of conviction of assault with intent to murder as a bar to this relief, the validity of that judgment has been put in issue in this proceeding. Certainly in view of the inordinate amount of time that the state court's jurisdiction over petitioner has been in controversy, it is imperative that the remaining question of its jurisdiction to try petitioner for assault with intent to murder be promptly disposed of in this proceeding.

[8] Assault with intent to kill is one of the crimes which the Ten Major Crimes Act places within the exclusive jurisdiction of the federal courts when committed by an Indian in Indian country. It appears from the opinion of the California Supreme Court affirming the judgment of conviction of assault with intent to murder that the assault was committed at the same place as the murder and the record in the case so shows. The Superior Court in and for the County of Madera therefore lacked jurisdiction to try petitioner for that offense.

The Writ of Habeas Corpus will issue and it is Ordered that petitioner be discharged from custody.

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JAMES R. BROWNING,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 562

FRED M. DICKSON, Warden of the California State Prison at San Quentin, California,

Petitioner,

vs.

RAYNA TOM CARMEN,

Respondent.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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Subject Index

Page

Reasons for granting rehearing and issuing the writ 2

I.

The opinions of the federal courts in this case are contrary to subsequent decisions of United States Courts of Appeals; this court has created a dual standard for determining a "waiver", one applicable to federal prisoners and another applicable to state prisoners 2

II.

This court, by its action in denying the petition has approved of the Circuit Court's action which places a statutory right above a constitutional right. Carmen received a trial which accorded him due process; he was accorded a fair trial with all of the procedural and substantive rights guaranteed by the state and federal constitutions 5

III.

By refusing to grant the petition for writ of certiorari this court has aggravated the confusion already existing concerning the application of the waiver doctrine in the Federal District Courts; there are numerous additional questions in doubt that were not specifically urged in the petition for certiorari 7

Conclusion 9

Table of Authorities Cited

Cases

	Pages
Brown v. Allen, 344 U.S. 443	6, 8
Cain v. U.S., 274 Fed.2d 337 (8th Cir., Nov. 6, 1959)	2, 3, 4
Daniels v. Allen, 344 U.S. 443	6, 8
Hodges v. U.S., ___ Fed.2d ___ (Cir. D.C., Dec. 30, 1959)	2
In re Carmen, 48 Cal.2d 851	3, 6
Irvine v. Dowd, 359 U.S. 394 (1959)	7
People v. Carmen, 36 Cal.2d 768	5

Statutes and Authorities

28 U.S.C. 2254	6, 7, 8, 9
Public Law 280, 1953	6
The Supreme Court, 1958 Term, Foreword, Henry M. Hart, Jr., 73 Harv. L.R. 84, p. 111	7

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PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Fred R. Dickson, petitioner, prays that this Court grant rehearing of its order of January 11, 1960, denying petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed December 4, 1959, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I.

THE OPINIONS OF THE FEDERAL COURTS IN THIS CASE ARE CONTRARY TO SUBSEQUENT DECISIONS OF UNITED STATES COURTS OF APPEALS; THIS COURT HAS CREATED A DUAL STANDARD FOR DETERMINING A "WAIVER", ONE APPLICABLE TO FEDERAL PRISONERS AND ANOTHER APPLICABLE TO STATE PRISONERS.

This Court, by refusing to review the opinions of the U. S. Court of Appeals and the U. S. District Court, has by inaction approved a dual standard for determining when a question has been "waived" in trial and appellate proceedings. The decisions in the U. S. Court of Appeals have adopted one standard of "waiver" applicable to federal prisoners in state courts and another standard applicable to state prisoners.

The recent decisions of the U. S. Court of Appeals in *Cain v. U.S.*, 271 Fed.2d 337 (8th. Cir., Nov. 6, 1959), and *Hodges v. U.S.*, ___ Fed.2d ___ (Cir. D.C. Dec. 30, 1959), are subsequent decisions of the Courts of Appeals indicative of the federal rules applicable to federal prisoners. These decisions indicate that the Circuit Courts are applying a different standard to federal prisoners than was applied to the state prisoner Carmen in the present case. In *Hodges v. U.S.*, *supra*, the court stated:

> "Although section 2255 contains no provision for exhaustion of federal appellate remedies before a collateral attack upon a federal sentence may be sustained, the orderly administration of criminal law by the federal courts, of somewhat

> comparable rank with comity, is involved in such an attack when no appeal has been prosecuted from the judgment of conviction and no reason advanced for the omission to appeal. We remain of the view that the right of appeal may not be abandoned and resort had to section 2255 whenever the conviction rests on evidence admitted at the trial in violation of a constitutionally protected right. Otherwise the appellate process to cure error in the admission of evidence would be pro tanto atrophied. One under sentence by a federal court in such a case could simply ignore his right of appeal and resort to section 2255 at any time * * *."

Indeed, California has argued consistently in the lower federal courts that the state process cannot be "simply ignore[d]". We have contended as has the Court of Appeals for the District of Columbia, that the ordinary state processes and state remedies ought not be short-circuited by permitting a petitioner to either ignore or fail to utilize the available state remedy. Carmen failed to utilize the state remedy available by his failure to present the matter to the jury. He thus waived the contention under state law. See *In re Carmen*, 48 Cal.2d 851. This Court ought not permit one rule to apply to federal prisoners and another rule to apply to state prisoners.

Like language is contained in the case of *Cain v. U.S.*, 271 Fed.2d 337 (8th Cir., Nov. 6, 1959), where the court states as follows:

> "In addition, they [the trial records] may have this effect by demonstrating that the petitioner

had prior opportunities to urge the claims of his motion and failed to do so, thereby raising a conclusive inference of their invalidity. Kyle v. United States, 2 Cir., 1959, 226 F.2d 670, certiorari denied October 19, 1959, 80 S.Ct. 131; Juelich v. United States, 6 Cir., 1958, 257 F.2d 424, certiorari denied 358 U.S. 847, 79 S.Ct. 72, 3 L.Ed.2d 81; Donovan v. United States, 10 Cir., 1953, 205 F.2d 557; United States v. Newman, D.C. 1954, 126 F.Supp. 94." (*Cain v. United States*, 271 F.2d 337, 338.)

This language is clearly in conflict with the standard applied by the U. S. District Court and the Ninth Circuit to the state prisoner Carmen. Carmen had, in the language of the *Cain* case, two "opportunities during the course of the various proceedings" to raise the question concerning his status and the locale of the crime. He was tried twice in what is conceded by all persons to have been a fair hearing in the California courts. He failed to utilize the remedy available and should not be heard to raise the matter collaterally.

The U. S. Court of Appeals has granted a stay of mandate in the present case to and including the filing and disposition of the petition for rehearing. This action by the Court of Appeals subsequent to the action of this Court in failing to grant a hearing is taken by the petitioner to indicate that that court feels that the questions raised by the petition for certiorari involve questions of widespread importance for the guidance of the Federal District Courts in the handling of state habeas corpus cases.

Petitioner likewise infers that the Court of Appeals is of the view that possible conflicts between the Circuit Courts and the opinions of this Court exist and should be resolved.

II.

THIS COURT, BY ITS ACTION IN DENYING THE PETITION HAS APPROVED OF THE CIRCUIT COURT'S ACTION WHICH PLACES A STATUTORY RIGHT ABOVE A CONSTITUTIONAL RIGHT. CARMEN RECEIVED A TRIAL WHICH ACCORDED HIM DUE PROCESS; HE WAS ACCORDED A FAIR TRIAL WITH ALL OF THE PROCEDURAL AND SUBSTANTIVE RIGHTS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.

Petitioner has not previously urged the distinction that exists between Carmen's case and the usual "constitutional right" case.

Rayna Tom Carmen was tried in the Superior Court of Madera County for the crime of murder and assault with intent to commit murder and was convicted on both counts. The original trial was reversed by the California Supreme Court on the ground that the trial court omitted to give certain instructions to the jury. See *People v. Carmen*, 36 Cal.2d 768. On retrial Carmen was again convicted of first degree murder and sentenced to death. Carmen has not contended in any federal proceeding that he was not accorded a fair trial in a "due process" sense. It appears to be conceded by all concerned that Carmen received a fair trial; that he was accorded all of the rights guaranteed to him by the federal and state constitutions.

What defect in the California process was so serious or what right of Carmen was abridged that was so important that Carmen has been permitted to effectively assert it in the federal courts?

What right of Carmen was violated which was so important that the federal courts, including this Court, have ignored the jurisdictional bar of 28 U.S.C. 2254 and have ignored the state procedural rule which required Carmen to raise this matter in the trial court and present it to the jury?

Indeed, this Court has sanctioned the waiver of rights guaranteed by the federal constitution, such as the right to be indicted by a fair and impartial and representative grand jury panel. See *Daniels v. Allen*, 344 U.S. 443. This Court and the various Courts of Appeals have held that many other constitutional rights can be waived by failure to assert them. See *Brown v. Allen*, 344 U.S. 443, at 503. Yet in the present case where it is conceded that Carmen had a fair trial and was denied no right guaranteed by the federal constitution he is nevertheless permitted to raise a statutory "right", and a "right" which no longer exists in the federal statutes. See Public Law 280, 1953. He is permitted to raise this question in disregard of the jurisdictional bar that he failed to use the proper procedure under state law. See *In re Carmen*, 48 Cal.2d 851.

III.

BY REFUSING TO GRANT THE PETITION FOR WRIT OF CERTIORARI THIS COURT HAS AGGRAVATED THE CONFUSION ALREADY EXISTING CONCERNING THE APPLICATION OF THE WAIVER DOCTRINE IN THE FEDERAL DISTRICT COURTS; THERE ARE NUMEROUS ADDITIONAL QUESTIONS IN DOUBT THAT WERE NOT SPECIFICALLY URGED IN THE PETITION FOR CERTIORARI.

This ruling, together with the decision in *Irvin v. Dowd*, 359 U.S. 394 (1959), fails to give the judge "even the pretense of a governing formulation to be followed."[1] The U. S. District Court's opinion, as approved by the U. S. Court of Appeals, which refuses to acknowledge the application of 28 U.S.C. 2254 and the doctrine that a person may waive a right, including constitutional rights, by his failure to raise his contention at the earliest time, creates confusion and doubt among the various District Courts in the handling of state habeas corpus cases. These decisions, together with the decision in *Irvin v. Dowd*, 359 U.S. 394 (1959), have left the U. S. District Court without any guidance as to their jurisdiction in state habeas corpus cases.

Not only is this a matter of great practical importance for the guidance of United States District Courts in the exercise of their habeas corpus jurisdiction, but also it is a problem which stands in the delicate area of federal-state relationships. This prob-

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[1] The Supreme Court, 1958 Term, Foreword, Harry M. Hart, Jr.

lem should be authoritatively determined, not left shrouded in conflict and confusion. We should not have one interpretation of 28 U.S.C. 2254 and the "waiver" doctrine in the Ninth Circuit and a different one in the other circuits.

Indeed, these cases when read in conjunction with *Brown v. Allen* and *Daniels v. Allen*, 344 U.S. 443, leave many questions unanswered, many not specifically urged in the petition for certiorari.

Is the scope of direct review by petition for writ of certiorari from the state appellate courts narrower than the scope of "review" by a federal District Court?

What is the significance of a denial of a petition for certiorari "without prejudice"?

May the U. S. District Court act, as did the District Court in Carmen's case, when the U. S. Supreme Court has apparently refused to review the State Supreme Court's decision on the basis that an adequate state ground existed for the state court's decision?

Is a California State procedural rule requiring Carmen to raise a jurisdictional matter at the time of the trial and present it to the jury an "unreasonable state procedural rule" and thus in violation of due process?

Is the failure to comply with a state procedural rule a bar to the raising of a question by habeas corpus only when the state procedural rule is reasonable or is the test one left to the discretion of the various U. S. District Courts?

Is the test as to when a person has "waived" a constitutional right different for federal prisoners than for state prisoners?[2]

Is waiver by failure to comply with state procedural rules identical with the failure to exhaust state remedies within the meaning of 28 U.S.C. 2254?

All of these questions have been created by the conflict of the District Court's opinion and the Court of Appeals' opinion and the opinions of this Court. All of these questions have been left unresolved by this Court by denying the petition for writ of certiorari.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
February 5, 1960.

Respectfully submitted,

STANLEY MOSK,
Attorney General of the State of California,

ARLO E. SMITH,
Deputy Attorney General of the State of California,

Counsel for Petitioner.

[2] See argument heading I.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

Dated, San Francisco, California,
February 5, 1960.

Arlo E. Smith,
Deputy Attorney General of the State of California,
Counsel for Petitioner.